Supreme Court, U.S.
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No. 95-215

IN THE

Supreme Court of the United States

OCTOBER TERM, 1995

SANDRA K. HUGHES,

Petitioner,

v.

MORRIS BEDSOLE, both individually and in his official capacity as Sheriff of Cumberland County, North Carolina; JAMES D. BOWSER, both individually and in his official capacity as Major of the Cumberland County Sheriff's Department; CUMBERLAND COUNTY SHERIFF'S DEPARTMENT, CUMBERLAND COUNTY, NORTH CAROLINA, and the WESTERN SURETY COMPANY, INCORPORATED,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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78 pp

Questions Presented

I. When presented with a prima facie case of sex discrimination and a prima facie case of First Amendment retaliatory discharge, may a public employer defendant meet its burden to articulate a legitimate, non-discriminatory reason(s) for its disparate disciplinary treatment and discharge of a plaintiff solely by the appellate argument of its counsel where the record does not contain any admissible evidence in which the employer sets forth the alleged non-discriminatory reason(s) for that disparate treatment?

II. Does a public employee and female plaintiff have a cause of action under the Fourteenth Amendment and 42 U.S.C. §1983 against a local governmental employer for employment discrimination on the basis of sex that is independent of any remedies or rights that may exist under Title VII of the Civil Rights Act of 1964?

III. Is there any material difference between the standard of proof and allocation of proof that a public employee must meet or articulate to demonstrate a prima facie case of retaliatory discharge in violation of 42 U.S.C. §2000e-3(a) of the Civil Rights Act of 1964, and the burden of proof and allocation of proof that a public employee must meet or articulate to demonstrate a prima facie case of retaliatory discharge in violation of the First Amendment?

IV. With respect to claims of sex discrimination and First Amendment retaliatory discharge, may a public employee and female plaintiff meet her burden to demonstrate a genuine issue of material fact as to her employer's retaliatory and discriminatory intent with respect to her discharge by production of evidence of disparate disciplinary treatment for which her employer did not articulate any legitimate, non-discriminatory reason(s) that was submitted as admissible evidence in the record of the case?

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No._____

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1995

SANDRA K. HUGHES,
Petitioner,

v.

MORRIS BEDSOLE,
both individually and in his official capacity as
Sheriff of Cumberland County, North Carolina;
JAMES D. BOWSER,
both individually and in his official capacity as
Major of the Cumberland County Sheriff's Department;
CUMBERLAND COUNTY SHERIFF'S DEPARTMENT,
CUMBERLAND COUNTY, NORTH CAROLINA,
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WESTERN SURETY COMPANY, INCORPORATED,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

Petitioner Sandra K. Hughes respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Fourth Circuit entered in the above entitled proceeding on April 10, 1995. OPINIONS *BELOW*

The opinion of the Court of Appeals for the Fourth Circuit is reported at 48 F.3d 1376 and is reprinted in the Appendix

hereto, App. at p. 1A, *infra*. The April 10, 1995 order of the Court of Appeals for the Fourth Circuit denying the petitioner's petition for rehearing and suggestion for rehearing in banc is also reprinted in the Appendix hereto, App. at p. 25A, *infra*.

The opinion of the United States District Court for the Eastern District of North Carolina is reprinted in the Appendix hereto, App. at p. 27A, *infra*. The January 31, 1994 order of the United States District Court for the Eastern District of North Carolina denying the petitioner's motion to amend judgment is also reprinted in the Appendix hereto, App. at p. 46A, *infra*.

JURISDICTION

The judgment and opinion of the Court of Appeals for the Fourth Circuit was issued on March 15, 1995. The petitioner's timely motion for rehearing and suggestion for rehearing in banc was denied on April 10, 1995. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. §1245(1).

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

U.S. Constitution, Amendment I:
Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech or of the press; or of the right of the people peaceable to assemble, and to petition the government for a redress of grievances.

U.S. Constitution, Amendment XIV, Section 1:
All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of

law; nor deny any person within its jurisdiction the equal protection of the laws 42 U.S.C. §1983:

Every person, who, under color of any statute, ordinance, regulation,, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

42 U.S.C. §2000e-2(a)(1):

Employers. It shall be an unlawful employment practice for an employer -

(1) to fail or refuse to hire or to discharge any individual or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin; or

42 U.S.C. §2000e-3(a):

Other unlawful employment practices

(a) Discrimination on account of opposition to unlawful practices or participation in investigation, proceeding, or hearing. It shall be an unlawful employment practice for an employer to discriminate against any of his employees or applicants for employment, for an employment agency, or joint labor-management committee controlling apprenticeship or other training or retraining, including on-the-job training pro-

grams, to discriminate against any individual, or for a labor organization to discriminate against any member thereof or applicant for membership, because he has opposed any practice made an unlawful employment practice by this title, or because he has made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing under this title.

42 U.S.C. §§2000e-5(f)(1) and (3):

Civil Action by Commission, Attorney General, or person aggrieved.

(1) If within thirty days after a charge is filed with the Commission or within thirty days after expiration of any period of reference under subsection (c) or (d), the Commission has been unable to secure from the respondent a conciliation agreement acceptable to the Commission, the Commission may bring a civil action against any respondent not a government, government agency, or political subdivision, named in the charge. In the case of a respondent which is a government, governmental agency, or political subdivision, if the Commission has been unable to secure from respondent a conciliation agreement acceptable to the Commission, the Commission shall take no further action and shall refer the case to the Attorney General who may bring a civil action against such respondent in the appropriate United States district court. The person or persons aggrieved shall have the right to intervene in a civil action brought by the Commission or the Attorney General in a case involving a government, governmental agency, or political subdivision.

If the charge filed with the Commission pursuant to subsection (b) is dismissed by the Commission, or if within one hundred and eighty days from the filing of such charge or the expiration of any period of reference under subsection (c) or (d), whichever is later, the Commission has not filed a civil

action under this section or the Attorney General has not filed a civil action in a case involving a government, governmental agency, or political subdivision, or the Commission has not entered into a conciliation agreement to which the person aggrieved is a party, the Commission, or the Attorney General in a case involving a government, governmental agency, or political subdivision, shall so notify the person aggrieved and within ninety days after the giving of such notice a civil action may be brought against the respondent named in the charge (A) by the person claiming to be aggrieved or (B) if such charge was filed by a member of the Commission, by any person whom the charge alleges was aggrieved by the alleged unlawful employment practice. Upon application by the complainant and in such circumstances as the court may deem just, the court may appoint an attorney for such complainant and may authorize the commencement of the action without the payment of fees, costs, or security. Upon timely application, the court may, in its discretion, permit the Commission, or the Attorney General in a case involving a government, governmental agency, or political subdivision, to intervene in such civil action upon certification that the case is of general public importance. Upon request, the court may, in its discretion, stay further proceedings for not more than sixty days pending termination of State or local proceedings described in subsections (c) or (d) of this section or further efforts of the Commission to obtain voluntary compliance. . . . .

(3) Each United States district court and each United States court of a place subject to the jurisdiction of the United States shall have jurisdiction of actions brought under this title. Such an action may be brought in any judicial district in the State in which the unlawful employment practice is alleged to have been committed, in the judicial district in which employment records relevant to such practice are maintained and administered, or in the judicial district in which the aggrieved person would have worked but for the alleged unlawful employment practice, but if the respondent is not found within any such

district, such an action may be brought within the judicial district in which the respondent has his principal office. For purposes of sections 1404 and 1406 of title 28 of the United States Code, the judicial district in which the respondent has his principal office shall in all cases be considered a district in which the action might have been brought.

Article I, §14, North Carolina Constitution:

Freedom of speech and of the press are two of the great bulwarks of liberty and therefore shall never be restrained, but every person shall be held responsible for their abuse.

N.C.Gen.Stat. §143-422.2:

It is the public policy of this State to protect and safeguard the right and opportunity of all persons to seek, obtain and hold employment without discrimination or abridgement on account of race, religion, color, national origin, age, sex or handicap by employers which regularly employ 15 or more employees. It is recognized that the practice of denying employment opportunity and discriminating in the terms of employment foments domestic strife and unrest, deprives the State of the fullest utilization of its capacities for advancement and development, and substantially and adversely effects the interests of employees, employers, and the public in general.

STATEMENT OF THE CASE

A. INTRODUCTION

Petitioner filed this action on December 12, 1991 against Morris Bedsole, both individually and in his official capacity as Sheriff of Cumberland County, North Carolina, James D. Bowser, both individually and in his official capacity as a Major

of the Cumberland County Sheriff's Department ("CCSD"), Cumberland County, North Carolina, and the Western Surety Company, Inc. In her complaint, the petitioner sought damages, injunctive and declaratory relief arising out of her March 27, 1989 discharge. In pertinent part, that complaint was based upon the petitioner's allegations that her discharge had been based upon her sex and in retaliation of her exercise of her First Amendment right to free speech. Federal jurisdiction was based upon 28 U.S.C. §§1331 and 1367(a).

The defendants moved for summary judgment on all claims on September 16, 1993. That motion was not based upon a claim(s) that the factual evidence with respect to sex discrimination and free speech retaliation did not indicate a genuine issue of material fact for the jury. Rather, with respect to those claims, all defendants relied upon certain legal arguments concerning the existence of certain causes of action, and the county defendant's position that, as a matter of law, it could not be held liable for the personnel decisions of the county sheriff regardless of whether any unlawful discrimination had occurred. On January 4, 1994, the Honorable Franklin T. Dupree, Jr., U.S. District Judge, issued a decision and order granting the defendants' motion for summary judgment. By order filed on January 31, 1994, Judge Dupree denied the petitioner's timely motion under Rule 59(e) to alter or amend the judgment.

Hughes appealed and the United States Court of Appeals for the Fourth Circuit affirmed on March 15, 1995 on grounds other than those upon which the district court had relied with respect to the petitioner's claims of sex discrimination and retaliatory discharge in violation of her free speech rights under the United States and North Carolina Constitutions. App. at pp. 14A n.7, and 14A-22A. The petitioner's timely motion for rehearing and suggestion for rehearing in banc was denied on April 10, 1995.

B. FACTS

Hughes began her employment with the CCSD in 1976. Her first assignment was to the position of matron in the Cumberland County Jail. Thereafter, Hughes became a road patrol officer for approximately 3 1/2 years. While working on the road patrol, Hughes was involved in an accident, and injured her right arm while working. Hughes was treated for this injury, reached maximum medical improvement, and returned full-time to her road patrol position for approximately one year. That accident left her with a permanent injury to her arm diagnosed as "persistent lateral epicondylitis". That permanent injury restricted the type of work that Hughes could perform, but it did not prevent her from performing the essential functions of a Road Patrol Officer with the CCSD.

In March, 1988, Hughes was promoted, and became the first female sergeant and shift supervisor in the history of the Cumberland County Jail. With that promotion, Hughes was also given responsibility for supervising one of the five platoons that staffed the Cumberland County Jail. Before March 16, 1989 in the month of March, Hughes met with Reverend Norman Mitchell (hereinafter referred to as "Mitchell"), the Chaplain of the Jail, and an employee of the CCSD. That meeting took place outside the established channels of command with the CCSD. For all of 1989, that chain of command was headed in the Jail by then Chief Jailer James Bowser. According to the record testimony of John Tyndall, the former Assistant Chief Jailer of the CCSD for about eight years and an officer in the CCSD Jail transportation unit at the time of his testimony, going outside the chain of command in March, 1989 was a violation of the responsibilities that Hughes had as a supervisor at the Jail. However, there was also evidence in the record that Bedsole had an "Open Door" policy which authorized such departures from the chain of command.

In the course of that meeting, Hughes expressed some concerns to Mitchell regarding understaffing in the CCSD, and

the threat that this understaffing posed for the safety of the persons employed or housed in that Jail. Those same concerns were shared by at least one other experienced Deputy Sheriff of the CCSD. Those concerns were also preceded by the appellant's experience with a near riot in the Jail, and an escape of several inmates from the Jail. Hughes also arranged for other employees of the Jail to meet or speak with Mitchell to express similar concerns at or around the March, 1989 date of petitioner's meeting with Mitchell. At some point also before March 16, 1989, Hughes met with Mitchell and Bedsole about these same concerns.

Shortly after that meeting with Bedsole, Hughes was suspended for three days without pay by Major Bowser and Sheriff Bedsole because of an incident in which some member of the Jail Ministry equipped with keys to the cellblocks and catwalks in the Jail left a catwalk door open at the Jail at the end of Hughes's shift at the Jail on March 16, 1989. After an investigation of this incident, Hughes accepted responsibility for the incident because it had happened on her shift, and she was not able at that time to determine which, if any, CCSD employee had left the catwalk doors unlocked.

Then on March 27, 1989, Hughes was discharged by Bedsole on the recommendation of Bowser for another incident on March 24, 1989 when an employee of the Jail left another door unlocked at the Jail. Hughes did not accept responsibility for this incident in any evidence presented to the lower courts. In 1989, Bedsole was interviewed by an EEOC investigator concerning, in part, why some lesser form of disciplinary action for Hughes short of discharge was not considered after the second unlocked door was discovered by Major Bowser on the petitioner's shift on March 24, 1989. According to the EEOC investigator, Bedsole explained to the EEOC that Hughes "was not demoted because [he] could not put her back on the road (a lot of injuries)."

No shift supervisor and sergeant other than Hughes has ever been fired or ever suffered a three day suspension for any other

incident in which an employee of the Jail left a door unlocked in the Jail during the shift supervised by that sergeant. In August, 1988, one female acting platoon leader (Marsha Hutchinson) who did not hold the rank of Sergeant at that time did receive 30 days of probation and a written reprimand for personally leaving doors unlocked in a single incident that occurred in August, 1988. The defendants presented testimony over the petitioner's objection that this same female officer may have presented some "concerns" to Sheriff Bedsole at some unspecified time when she did not hold the rank of Sergeant. At least one male shift sergeant (Leroy Park) who had not voiced any concerns to any person about the security problems in the Jail did not suffer any disciplinary action which resulted in any loss of pay even though he had been the shift sergeant with responsibility over the Cumberland County Jail in at least two other incidents on July 19 and 30, 1989 in which employees of the Jail left a door unlocked in the Jail.

The "CCSD records and Bedsole's later statement to an EEOC investigator do not explain why the male sergeant was not disciplined for the July incidents." App. at p. 15A. Those same CCSD records and Bedsole's later statement to the EEOC also do not contain any explanation for the decision to discharge Hughes based upon the second unlocked door incident on March 24, 1989. In addition, the defendants did not place any evidence in the record of this case in which Sheriff Bedsole provided any explanation or reason for the disparate treatment of Hughes and Sergeant Park in connection with the two incidents in March, 1989 which involved Hughes, and the two incidents in July, 1989 which involved Park. However, the record did indicate the reasons that Bedsole offered to the EEOC for its disciplinary action against Hughes on March 16, 1989. Those three reasons from the EEOC investigator's interview notes were: "1. she was in charge 2. she probably neglected to lock them 3. she should have discovered the doors unlocked". The EEOC interview notes also indicated that Bedsole told the EEOC that Sergeant Park was not disciplined for an incident

in the Jail that occurred in February, 1989 when a door was left unlocked because it could not be determined who left the doors unlocked.

C. DISTRICT COURT OPINION BELOW

The District Court framed the sex discrimination and First Amendment retaliatory discharge issues as follows:

1) Did Sheriff Bedsole, in his official capacity as Sheriff of Cumberland County, have "final policymaking authority" for Cumberland County under 42 U.S.C. §1983 with respect to the discipline of employees of the Cumberland County Sheriff's Department?

2) Did the petitioner's actions and speech to Sheriff Bedsole and Chaplain Mitchell constitute matters of "public concern" under the First Amendment or Article I, §14, of the North Carolina Constitution?

3) Was the evidence of record sufficient to allow a reasonable jury to find that the plaintiff was discharged because she was a woman?

The District Court answered each of these three questions in the negative. App. at pp. 35A-42A. The District Court concluded as a matter of law that because North Carolina state law expressly indicated that Cumberland County had no role in the hiring and firing of the Sheriff's employees, Sheriff Bedsole in his official capacity did not have "final policymaking authority" for Cumberland County with respect to CCSD personnel decisions. App. at pp. 35A-37A. The District Court then determined as a matter of law that the matters that Hughes raised with Sheriff Bedsole and Chaplain Mitchell were not of "public concern" under the First Amendment and Article I, §14, of the North Carolina Constitution. App. at pp. 38A-41A. Lastly, after a single-sentence review of the evidence, the District Court decided in that same sentence that there was no evidence in the record from which a reasonable jury could find that the plaintiff was discharged because she was a woman. App. at p.

41A - 42A. The petitioner filed a timely motion under Rule 59(e) to amend this final judgment of the District Court based upon certain additional evidence relevant to the factual issue of discrimination that had not been previously submitted to the District Court due to the defendants' failure to raise any factual issue in their original motion for summary judgment which in any way related to that factual issue. App. at p. 6A. That motion was denied. App. at p. 46A.

D. FOURTH CIRCUIT OPINION BELOW

The Fourth Circuit opinion decided the petitioner's appeal on the three above issues decided by the District Court on grounds or evidence other than that which was relied upon by the District Court. App. pp 14A-22A. The Fourth Circuit expressly considered all of the evidence offered by the petitioner to the District Court on the issues of sex discrimination and retaliation in violation of the First Amendment and Article I, §14, of the North Carolina Constitution. App. at p. 14A n.7. After consideration of that evidence, the Fourth Circuit determined that the petitioner had demonstrated a prima facie case of sex discrimination. *Hughes v. Bedsole*, App. at p. 14A.

However, the Fourth Circuit affirmed the District Court's rejection of the petitioner's sex discrimination claims under 42 U.S.C. §1983 and the Fourteenth Amendment, and N.C.Gen. Stat. §143-422.2. That affirmation was based in part upon its view that Hughes did not have a cause of action for sex discrimination under 42 U.S.C. §1983 and the Fourteenth Amendment that was independent of any cause of action under 42 U.S.C. §2000e-5(f)(1) of Title VII of the Civil Rights Act of 1964. App. pp. 11A-12A n.6. It was also based upon its view that the evidence that Hughes had submitted was insufficient to establish a genuine issue of material fact regarding whether the reasons offered by the respondents' counsel in oral and written argument before the Fourth Circuit to rebut the petitioner's prima facie case were pretext. App. at pp. 12A - 16A, and esp.

p. 15A at n.8. That argument by defendants' counsel before the Fourth Circuit was relied upon by the Fourth Circuit to rebut the petitioner's prima facie case despite the petitioner's argument at pages 28-30 of her opening brief to the Fourth Circuit, pages 11-12 of her reply brief, and in oral argument before the Fourth Circuit that "there is simply no evidence in the record" that explains or purports to explain the disparate treatment afforded Hughes and Sergeant Leroy Park.

The Fourth Circuit also affirmed the District Court's rejection of the petitioner's free speech claims. That rejection was based at least in part upon its view that there was a material difference between the nature and application of the burden of proof in a retaliatory discharge case under 42 U.S.C. §2000e-3(a) of Title VII of the Civil Rights Act of 1964 and a retaliatory discharge case under the First Amendment and 42 U.S.C. §1983. 48 F.3d at 1387; App. pp. 20A-21A. Based upon its determination as to the nature of the petitioner's burden of proof in a free speech context and its consideration of the reasons advanced by respondents' counsel in oral and written argument before the Fourth Circuit as to the reasons for the disparate disciplinary treatment suffered by Hughes, the Fourth Circuit determined that the petitioner had not set forth specific facts raising a genuine issue of material fact regarding whether her speech was a substantial or motivating factor behind her discharge. *Hughes v. Bedsole*, 48 F.3d at 1384-88. Again, the Fourth Circuit considered and relied upon the oral and written arguments of defendants' counsel on this free speech causation issue despite the oral and written arguments of plaintiff's counsel to the contrary at page 37-40 of her opening brief to the Fourth Circuit, and pages 10-13 of her reply brief to the Fourth Circuit.

REASONS FOR GRANTING THE WRIT

I. THE OPINION BELOW CONFLICTS WITH THE PRIOR DECISION OF THIS COURT IN *TEXAS DEPARTMENT OF COMMUNITY AFFAIRS v. BURDINE*, 450 U.S. 248, 255 (1981), AND NUMEROUS OTHER CIRCUIT COURT DECISIONS WHICH HAVE HELD THAT A DEFENDANT CANNOT MEET ITS BURDEN TO REBUT THE PLAINTIFF'S PRIMA FACIE PROOF OF DISCRIMINATION OR RETALIATION BY AN EXPLANATION OR ARTICULATION THAT IS NOT ADMITTED INTO EVIDENCE

In *Texas Department of Community Affairs v. Burdine*, 450 U.S. 248, 254 (1981)(hereinafter "*Burdine*"), this Court held that after a plaintiff in an employment discrimination case produces evidence sufficient to establish a prima facie case, the burden then shifts to the defendant of "producing evidence" of some "legitimate, non- discriminatory reason" for the disparate treatment evidence offered by the plaintiff. The Court went on to say that:

> "[t]o accomplish this, the defendant must clearly set forth, through the introduction of admissible evidence, the reasons for the plaintiff's rejection. The explanation provided must be legally sufficient to justify a judgment for the defendant."

Id., 450 U.S. at 255 (footnote omitted). In footnote 9 at page 255 of that same decision, the Court explained the first sentence that appears in the text that is quoted above from page 255 as follows:

> "An articulation not admitted into evidence will not suffice. Thus, the defendant cannot meet its burden merely through an answer to the complaint or *by argument of counsel.*"

Id., 450 U.S. at 255 n.9 (emphasis added).

The rules of law and proof allocation in employment dis-

crimination cases has been adopted and applied by numerous federal courts of appeal. *Joshi v. Florida State University Health Center*, 763 F.2d 1227, 1233 (11th Cir. 1985); *Uviedo v. Steves Sash & Door Co.*, 738 F.2d 1425, 1429 (5th Cir. 1984), *cert. denied*, 474 U.S. 1054 (1986); *Miller v. WFLI Radio, Inc.*, 687 F.2d 136, 138 (6th Cir. 1982); *Nanty v. Barrows Co.*, 660 F.2d 1327, 1332 (9th Cir. 1981). For example, in *IMPACT v. Firestone*, 893 F.2d 1189, 1193-94 (11th Cir. 1990), the Eleventh Circuit specifically followed and applied the language quoted above from *Burdine*, and rejected a district court opinion that relied upon the contentions of defendant's counsel and the district court's articulation and explanation of the disparate treatment evidence in that case because the defendants did not:

> "... offer proof by any person who made the employment decision, or by any other person, stating the decision was made on the basis of what he or she thought demonstrated the best qualified person."

IMPACT v. Firestone, *supra*, 893 F.2d at 1194. This same rule of law has also been adopted by a number of federal circuit courts of appeal in First Amendment retaliatory discharge cases with respect to the plaintiff's burden to prove causation. See *Tao v. Freeh*, 27 F.3d 635, 641 (D.C.Cir. 1994). In *Tao v. Freeh*, *supra*, the D.C. Circuit noted that the "... appellees presented *evidence* [in rebuttal of the plaintiff's disparate treatment evidence] that the decision to allow Chang and Lau to be re-evaluated on their original applications was based on the fact that Chang and Lau had only accuracy problems and were otherwise qualified for promotion." *Tao v. Freeh*, 27 F.3d at 641 (emphasis added).

In this case, the Fourth Circuit's decision recognized that the "CCSD records and [Sheriff] Bedsole's later statement to the EEOC investigator do not explain why the male sergeant [Leroy Park] was not disciplined for the July incidents." 48 F.3d at 1385; App. at p. 15A. That observation should have resulted in a determination that the petitioner had produced

sufficient evidence to require a jury trial on her employment discrimination and retaliatory discharge claims. *Burdine*, 450 U.S. at 255 n.9; *Nanty v. Barrows Co., supra*, 660 F.2d at 1332. Nevertheless, the Fourth Circuit specifically relied upon the *contentions of defendants' counsel* in appellate oral argument and briefing to that court as the articulation and explanation required by *Burdine* for that disparate treatment and "apparent discrepancy". 48 F.3d at 1385; App. at p. 15A at n.8 (specifically citing oral argument as apparent source of *Burdine* explanation, and relying upon what "appellees maintain" with respect to "this apparent discrepancy").

If the Fourth Circuit's application of *Burdine* in this case is allowed to stand, it will essentially vitiate the force of the *Burdine* decision for all district courts within the Fourth Circuit's jurisdiction. Employers will no longer be required to produce admissible evidence of the actual and legitimate reason(s) for any employment decision that is the subject of an employment discrimination action in which the employee has established a prima facie case. Instead, employers will be free to cobble together some *post hoc* reason(s) for the disparate treatment of their employees or job applicants through the advocacy of their attorneys in oral arguments before district and appellate courts. This occurrence will contribute to increased discrimination in all forms of private and public employment. The petitioner submits that this result "... foments domestic strife and unrest, deprives the State of the fullest utilization of its capacities for advancement and development, and substantially and adversely effects the interests of employees, employers, and the public in general." N.C.Gen.Stat. §143-422.2.

II. THE OPINION BELOW CONFLICTS WITH MANY CIRCUIT COURT DECISIONS WHICH HAVE HELD THAT EMPLOYEES OF LOCAL GOVERNMENT HAVE A CAUSE OF ACTION FOR RACE OR SEX DISCRIMINATION UNDER THE FOURTEENTH AMENDMENT AND 42 U.S.C. §1983

THAT IS INDEPENDENT OF ANY CAUSE OF ACTION FOR THAT SAME EMPLOYMENT DISCRIMINATION UNDER 42 U.S.C. §§2000e-5(f)(1) and (3)

The Fourth Circuit's opinion in this case rejected the petitioner's sex discrimination in part because of its determination of law that "Hughes cannot bring an action under §1983 for violation of her Fourteenth Amendment rights because Hughes originally could have instituted a Title VII action." 48 F.3d at 1376; App. at p. 11A at n.6. This holding conflicts with a large number of federal circuit decisions which heretofore were unanimous in the conclusion that an employee of a local governmental entity had a cause of action under 42 U.S.C. §1983 and the Fourteenth Amendment for employment discrimination on the basis of sex or race that was entirely independent of any possible claim under Title VII of the Civil Rights Act of 1964. *Annis v. County of Westchester*, 36 F.3d 251, 255 (2nd Cir. 1994); *Beardsley v. Webb*, 30 F.3d 524, 529 (4th Cir. 1994); *Bradley v. Pittsburgh Board of Education*, 913 F.2d 1064, 1079 (3d Cir. 1990); *Johnston v. Harris County Flood Control District*, 869 F.2d 1565, 1573 (5th Cir. 1989), *cert. denied*, 493 U.S. 1019 (1990); *Starrett v. Wadley*, 876 F.2d 808, 814 (10th Cir. 1989); *Roberts v. College of the Desert*, 870 F.2d 1411, 1415-16 (9th Cir. 1988); *Keller v. Prince George's County*, 827 F.2d 952, 956-63 (4th Cir. 1987); *Trigg v. Wayne County Community Schools*, 766 F.2d 299, 302 (7th Cir. 1985); *Day v. Wayne County Board of Auditors*, 749 F.2d 1199, 1205 (5th Cir. 1984). This conflict between the decision in this case and the decision on this same issue by many other federal circuit court decisions needs resolution.

Based upon the legislative history reviewed in the Fourth Circuit's 1987 opinion in *Keller v. Prince George's County, supra*, 827 F.2d at 956-63, and for the reasons set forth in that opinion and those other federal circuit court opinions that are cited above, the petitioner submits that the public interest

against sex discrimination in employment would be served if this Court granted a writ of certiorari in this case, and summarily reversed, vacated, and remanded this action for trial on the sex discrimination and retaliatory discharge claims of the petitioner. If the writ did grant, then there would be no conflict between the various federal circuit court opinions on this issue, and the public interest in providing a full and complete remedy for any form of illegal employment discrimination would be vindicated.

III. THE OPINION BELOW CONFLICTS WITH THE OPINION OF THIS COURT IN *PRICE, WATERHOUSE v. HOPKINS*, 490 U.S. 228, 248-49 (1989), AND AT LEAST ONE CIRCUIT COURT DECISION WHICH HAS HELD THAT THERE IS NO MATERIAL DIFFERENCE BETWEEN THE STANDARD OF PROOF AND ALLOCATION OF PROOF THAT A PUBLIC EMPLOYEE MUST MEET TO DEMONSTRATE A PRIMA FACIE CASE OF RETALIATORY DISCHARGE IN VIOLATION OF 42 U.S.C. §2000e-3(a) OF THE CIVIL RIGHTS ACT OF 1964 AND THE BURDEN OF PROOF THAT A PUBLIC EMPLOYEE MUST MEET TO DEMONSTRATE A PRIMA FACIE CASE OF RETALIATORY DISCHARGE IN VIOLATION OF THE FIRST AMENDMENT

In 1989, this Court drew a close analogy between the burdens of proof in the Title VII gender discrimination case at hand and those involved in a First Amendment public employee retaliatory discharge case such as *Mt. Healthy City School District Board of Education v. Doyle*, 429 U.S. 274 (1977)(hereinafter "*Mt. Healthy*"). *Price, Waterhouse v. Hopkins*, 490 U.S. 228, 248-49 (1989). In so doing, this Court stated that:

> "[a] court that finds for a plaintiff under this standard [requiring proof by a defendant employer that it would

have fired the plaintiff even in the absence of protected conduct] has effectively concluded that an illegitimate motive was a "but-for" cause of the employment decision." *Id.*, 490 U.S. at 249.

This close analogy between the burdens of proof in Title VII cases and First Amendment retaliatory discharge cases has been adopted and applied by other federal courts of appeal with the premise that the "causation inquiry" for First Amendment retaliatory discharge claims requires that "essentially the same inquiry" be applied as that which is used in Title VII discrimination claims. *Pierce v. Texas Department of Criminal Justice*, 37 F.3d 1146, 1151 (5th Cir. 1994). See also *Tao v. Freeh*, *supra*, 27 F.3d at 641. Based upon that understanding, a number of federal circuit courts of appeal have recognized that there is no material difference between the nature and type of proof that will satisfy the plaintiff's burden under 42 U.S.C. §2000e-3(a) to demonstrate that "a causal connection existed between the protected activity and the adverse action" and the plaintiff's burden under the First Amendment and 42 U.S.C. §1983 to demonstrate that his or her protected free speech activities were the "substantial" or "motivating factor" in the adverse employment decision. Thus, a plaintiff may meet his burden under 42 U.S.C. §2000e-3(a) to demonstrate prima facie proof of a "causal connection" between the plaintiff's discharge and his or her protected activity through indirect evidence of disparate treatment of fellow employees who did not engage in any protected activity. *De Cintio v. Westchester County Medical Center*, 821 F.2d 111, 115 (2nd Cir.), *cert. denied*, 484 U.S. 965 (1987). Similarly, a plaintiff may meet his burden to show that the plaintiff's protected free speech activity was a "substantial" or "motivating factor" in the adverse employment decision by production of indirect evidence of disparate treatment of fellow employees who did not engage in any protected speech activity. *Tao v. Freeh*, *supra*, 27 F.3d at 641; *Mt. Healthy*, *supra*, 429 U.S. at 287.

In contrast, the Fourth Circuit panel in this case based its

rejection of the petitioner's free speech claims based in significant part on its perception that the "different standard" of proof for claims of retaliation under 42 U.S.C. §2000e-3(a) and the First Amendment made a material difference in the nature and amount of proof required to allow a First Amendment claim to go to the jury. 48 F.3d at 1387-88; App. at pp. 20A-21A. The perception resulted in the Fourth Circuit's conclusion that the petitioner could not satisfy her burden to show a jury issue with respect to the question of causation on her First Amendment claim based upon the:

> "... basic facts of the temporal connection and the male sergeant's receipt of no punishment after two similar security violations . . .".

48 F.3d at 1388; App. at p. 22A. Again, as noted in Part I above of the Reasons for Granting the Writ section of this petition, the Fourth Circuit considered the reasons advanced by defendants' counsel in oral argument and briefing to the Fourth Circuit with respect to the defendants' disparate treatment of the plaintiff and that "male sergeant" even though none of those reasons were submitted as evidence in the record from the decisionmakers involved. *Id.* ("Considering Appellees' legitimate, nondiscriminatory reasons and the absence of any evidence of animus by Bedsole on account of Hughes' free speech . . .").

The petitioner submits that the issue of the identity or disparity between the respective burdens of proof and the order of that proof in the Title VII retaliation context and the First Amendment free speech public employee context is an extremely important issue for the thousands of public employees in this country. Because of the conflict between the Fourth Circuit opinion in this case, this Court's decision in *Price, Waterhouse v. Hopkins*, *supra*, and the decisions of other federal circuit courts of appeal on this issue, the petitioner believes that the Court should accept this issue for review by certiorari to resolve a number of substantial questions that are raised by this case, including, *inter alia*, whether it is permissible to use oral argument of counsel or other inadmis-

sible evidence to rebut a prima facie case of causation in a First Amendment retaliatory discharge public employee case when this Court's opinion in *Burdine* indicates that it is clearly impermissible in the Title VII context.

IV. THE OPINION BELOW CONFLICTS WITH AT LEAST ONE OTHER CIRCUIT COURT DECISION WHICH HAS HELD THAT AN EMPLOYEE CAN MEET HER BURDEN TO ESTABLISH A GENUINE ISSUE FOR TRIAL ON A CLAIM OF RETALIATION UNDER THE FIRST AMENDMENT BY PRODUCTION OF EVIDENCE THAT DEMONSTRATES DISPARATE TREATMENT PROXIMATE IN TIME TO THE FREE SPEECH WHERE NO EXPLANATION OR ARTICULATION OF THAT DISPARATE TREATMENT IS ADMITTED INTO EVIDENCE

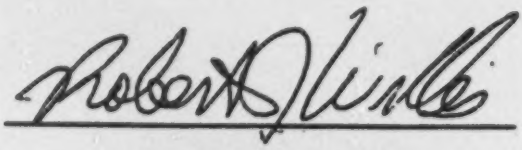
The Fourth Circuit's opinion in this case held that the plaintiff's evidence of a temporal connection between the date of her discharge and the date of her protected free speech activity, and the male sergeant's receipt of no punishment after two similar security violations did not create a jury issue. 48 F.3d at 1388; App. at p. 22A. This opinion directly conflicts with the recent opinion of the U.S. Court of Appeals for the District of Columbia in which that federal circuit court held that evidence of an employer's disparate treatment of an employee who had engaged in protected free speech activity was sufficient to warrant a jury trial. *Tao v. Freeh, supra*, 27 F.3d at 641. In *Tao v. Freeh, supra*, the plaintiff delivered a letter to the head of the FBI (her employer) in which she charged that she and many other Chinese-American employees of the FBI were the victims of race discrimination. *Tao v. Freeh*, 27 F.3d at 640. In support of her claim that she was denied a promotion in retaliation for that letter, she presented evidence that her employer refused to re-evaluate her application for promotion by showing " . . . that other similarly situated employees

who made no claims of discrimination were re-evaluated." *Tao v. Freeh*, 27 F.3d at 641.

The manner and order of proof in free speech, public employee retaliatory discharge cases is an issue of great public importance. Without the public's access to the information and knowledge that the thousands of public employees in this country have with respect to the actions and intentions of their governmental employers, all residents of this country would suffer. The petitioner submits that the direct conflict between the decision of the D.C. Circuit in *Tao v. Freeh*, *supra*, and the opinion in this case on the nature and type of evidence that will be considered as sufficient to warrant a jury trial in a public employee free speech case is sufficient alone to warrant the granting of the writ requested by the petitioner. This is even more the case when one considers the thousands of public employees and millions of residents in this country who benefit or would benefit from the information and knowledge available from public employees who may be empowered by the requested clarification of this conflict in the law to engage in a full and free exercise of their First Amendment right to free speech on matters of public concern.

CONCLUSION

This case presents the Court with an opportunity for resolving important statutory and constitutional issues relating to the type, order, and nature of the proof that is required to rebut a prima facie claim of employment discrimination claim under 42 U.S.C. §§2000e-2(a)(1), 2000e-3(a), 42 U.S.C. §1983, and the First and Fourteenth Amendments, and their relationship to the type, order, and nature of the proof required to demonstrate and rebut a prima facie claim of free speech, public employee employment retaliation. This case also presents the Court with an opportunity to determine whether a female employee of a local governmental employer has a cause of action under 42 U.S.C. §1983 and the Fourteenth Amendment for sex discrimination in that employment that is independent of any cause of action that she may have under Title VII of the Civil Rights Act of 1964.



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PUBLISHED

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

Sandra K HUGHES,

Plaintiff-Appellant,

v.

Morris BEDSOLE, both individually and in his official capacity as Sheriff of Cumberland County, North Carolina; James D. Bowser, both individually and in his official capacity as a Major of the Cumberland County Sheriff's Department; Cumberland County Sheriff's Department; Cumberland County, North Carolina; Western Surety Company, Incorporated,

Defendants-Appellees.

Southern States Police Benevolent Association, Amicus Curiae.

No. 94-1299.

Appeal from the United States District Court for the Eastern District of North Carolina, at Fayetteville. Franklin T. Dupree, Jr., Senior District Judge.
(CA-91-115-3-H-D)

Argued: October 31, 1994

Decided: March 15, 1995

Before RUSSELL and HALL, Circuit Judges, and WILLIAMS, Senior United States District Judge for the Eastern District of Virginia, sitting by designation.

Affirmed buy published opinion. Judge Russell wrote the opinion, in which Judge Hall and Senior Judge Williams joined.

ARGUED: Robert James Willis, Raleigh, NC, for appellant. Joseph Michael McGuinness, McGuinness & Parlagreco, Elizabethtown, NC, for amicus curiae. Craig A. Reutlinger, Van Hoy, Reutlinger & Taylor, Charlotte, NC, Bobby Grey Deaver, Fayetteville, NC, for appellees. ON BRIEF: Philip M. Van Hoy, Van Hoy, Reutlinger & Taylor, Charlotte, NC, for appellees Cumberland County, Sheriff's Dept., Bowser, and Bedsole; Larry J. McGlothlin, Fayetteville, NC, for appellee Bowser.

OPINION

DONALD RUSSELL, Circuit Judge:

Plaintiff-Appellant Sandra K. Hughes appeals the district court's decision dismissing on summary judgment her claims that her discharge from her position as a jail shift supervisor was unlawfully motivated by her sex, her exercise of her right to free speech, and her handicapped status. We affirm.

I.

The Sheriff's Department of Cumberland County, North Carolina (CCSD), first employed Hughes in 1976 as a matron in the Cumberland County Jail. After eight and one-half years as a matron, she became a road patrol officer. While working on the road patrol on August 5, 1986, Hughes injured her right arm when she was involved in a car accident. The accident left her with a permanent injury to her arm diagnosed as "persistent lateral epicondylitis" (or "tennis elbow"). Joint Appendix (JA) at 308, 324-25. The injury restricted the type of work that Hughes could perform, but it did not prevent her from performing the essential functions of a full-time road patrol officer.

Hughes was promoted in March 1988 and became the first female sergeant and shift supervisor in the history of the Cumberland County Jail. Apparently dissatisfied with some of the working conditions at the jail, Hughes met with Reverend Norman Mitchell, the Chaplain of the Jail, in late February or early March, 1989. At the meeting, Hughes expressed concerns regarding understaffing at CCSD and the threat that this understaffing posed to the safety of persons housed or employed at the jail. She also discussed the improper training of certain jail personnel and complaints from some female employees about derogatory remarks made to them by male employees. Hughes arranged for other jail employees to meet with Mitchell and voice similar concerns. Mitchell relayed Hughes' concerns to Cumberland County Sheriff Morris Bedsole, whereupon Bedsole requested a meeting with Hughes and Mitchell to discuss the matters.

At some point before March 16, 1989,[1] Hughes and Mitchell met with Bedsole to discuss Hughes' concerns regarding understaffing, improper training, and derogatory remarks made by male employees to female employees. Bedsole was sympathetic to Hughes' understaffing concerns, but he told her that he could not hire more employees until the Cumberland County Commission approved the new CCSD budget. Bedsole assured her he would investigate into conditions at the jail, and he accepted two of Hughes' suggestions of employees who might serve as training officers to alleviate any training deficiency.

On March 16, 1989, a member of the jail ministry team left two jail catwalk doors unlocked during Hughes' shift. Bedsole suspended Hughes for three days without pay because of the

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[1] The evidence in the record is unclear as to whether this meeting occurred before or after Hughes' three-day suspension. The exact date of this meeting, however, is immaterial to our decision in this case; and we adopt Hughes' recollection of the date for the purpose of reciting the facts.

incident. After being counseled by CCSD Major James D. Bowser about this security violation, Hughes admitted telling Bowser that "he could take her job and shove it," or words to that effect. JA at 99.

On March 24, 1989, a second incident occurred when a jail employee left a jail door unlocked during Hughes' shift On March 27, 1989, in a meeting with Bedsole, Bowser, CCSD Major Richard Washburn, and George T. Franks, the Sheriff's Legal Advisor, Washburn informed Hughes that she was discharged. Hughes received a confirmation letter from Bedsole the next day. Neither Washburn nor Bedsole informed Hughes at the time specifically why she was fired, but Hughes later learned when she applied for unemployment compensation that Bedsole discharged her because of the two security violations involving unlocked doors that had occurred during her shift.

Other evidence before the district court at summary judgment demonstrated Hughes' attitude towards her working environment. For instance, between the two incidents of the unlocked doors, Hughes went to Washburn, her immediate superior, and asked that she be transferred to some other position even if it meant surrendering her sergeant's stripes. Leroy Park, another platoon sergeant at the CCSD jail, testified that during this same time, Hughes had turned sour against the department and was continually complaining to others about the working conditions at the jail.[2]

Following her discharge, Hughes filed a complaint with the Equal Employment Opportunity Commission (EEOC). The

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[2] Contrary to any implications in Hughes' reply brief, we may consider Park's testimony. Hughes filed Park's deposition before the district court on October 8, 1993, and the testimony was properly in the record. Pleading No. 68, filed October 8, 1993; *see* JA at 424-25. Moreover, portions of Park's testimony are recounted in the segments of Hughes' second deposition included in the joint appendix before this Court. JA at 135-36.

EEOC conducted an investigation and furnished Hughes with a right to sue letter. As part of the investigation, an EEOC investigator interviewed Bedsole. The EEOC file was destroyed, but Hughes filed in this action the affidavit of the EEOC investigator who interviewed Bedsole, in which the investigator attests to the accuracy of a copy of her handwritten notes attached to her affidavit. In her notes, the interviewer wrote that Bedsole said that CCSD "tried to get people to help [Hughes]" but that "there were problems on her shift" and that she "caused problems with some of her employees." JA at 232. The investigator also wrote that Bedsole said that Hughes "was not demoted because [he] couldn't put her back on the road (a lot of injuries) nor could she be put down into a jailer's positions." *Id* at 232-33.

On December 12, 1991, Hughes filed this action in the Eastern District of North Carolina against Defendants-Appellees Cumberland County, CCSD, Bedsole and Bowser, in their official and individual capacities and the Western Surety Company, Inc., under 42 U.S.C. § 1983, the First Amendment, the Equal Protection Clause of the Fourteenth Amendment, 29 U.S.C. § 794, §§ 1, 12, 14, and 19 of Article I of the North Carolina Constitution, N.C. Gen.Stat. § 58-76-5, and the North Carolina common law of wrongful discharge. Hughes complained that her recommendation for discharge and her actual discharge were unlawfully motivated by the exercise of her right to free speech concerning a matter of public concern, by her sex, and by the handicapped status of her right arm.

To support her claim, Hughes alleged in her affidavit that no other shift sergeant had ever been fired for an incident in which a jail employee left a door unlocked during the shift supervised by that sergeant. She produced specific CCSD personnel records demonstrating six incidents in which jail employees had left doors unsecured. The evidence details the one-day suspensions of the six jailers involved in five of the

incidents but does not document any punishment, or lack of punishment, for the respective sergeants on duty. Hughes, however, did state in her affidavit that she knew "for a fact" that a male shift sergeant, who the parties stipulated was the sergeant on duty with respect to one of the incidents, did not suffer any disciplinary action resulting in loss of pay. Hughes also alleged that it was her "understanding" that none of the shift sergeants who were on duty when the incidents occurred were charged or suspended with loss of pay for the incidents. JA at 307-08. Furthermore, she stated in her affidavit that she was the only sergeant who had spoken to Mitchell and Bedsole about the mismanagement of the jail.

On September 16, 1993, Appellees filed motions for summary judgment on all claims; and the district court heard the motions on December 29, 1993. During the hearing, the district court raised a number of factual issues *sua sponte* that Appellees had not identified in their summary judgment motion and supporting memorandum. The district court granted Appellees summary judgment on January 4, 1994. In dismissing Hughes' claims, the court relied on the absence of certain factual evidence on three of the four areas that were raised *sua sponte* by the Court during the December 29 hearing.

On January 6, 1994, Hughes filed a motion under Fed.R.Civ.P. 59(e) to alter or amend the judgment of the district court. Among other things, she attached to her motion a supplemental affidavit in which she attested to the existence of jury issues with respect to certain factual issues the court had raised *sua sponte*. The district court denied Hughes' motion by an order filed January 31, 1994, and expressly refused to consider any evidence that was not in the record "at the time of the rendition of the judgment" entered on January 4, 1994. JA at 524.

II.

Hughes first complains that the district court committed reversible error by reviewing factual issues *sua sponte* in consideration of Appellees' summary judgment motion without giving her a reasonable opportunity to submit relevant previously obtained evidence. The Supreme Court has held that the party moving for summary judgment must demonstrate that "there is an absence of evidence to support the nonmoving party's case," *Celotex Corp. v. Catrett* 477 U.S. 317, 325, 106 S.Ct. 2548, 2554, 91 L.Ed.2d 265 (1986), and that once the moving party makes such a showing, the non-moving party "may not rest upon mere allegation or denials of his pleading, but must set forth specific facts showing that there is a genuine issue for trial." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 256, 106 S.Ct. 2505, 2514, 91 L.Ed.2d 202 (1986). This Court has noted that this obligation of the nonmoving party "is particularly strong [as in this case] when the nonmoving party bears the burden of proof." *Pachaly v. City of Lynchburg*, 897 F.2d 723, 725 (4th Cir.1990). Regarding the authority of federal courts to enter summary judgment *sua sponte*, the Supreme Court has stated that "district courts are widely acknowledged to possess the power to enter summary judgments *sua sponte*, so long as the losing party was on notice that she had to come forward with all of her evidence." *Celotex*, 477 U.S. at 326.

In this case, the district court notified Hughes at the December 29 hearing that it would consider *sua sponte* the adequacy of her evidence on her sex discrimination claim, her free speech claim, and her related claim against Bowser.[3] The court

speech claim, and her related claim against Bowser.[3] The court inquired as to what evidence Hughes could produce that Bedsole fired her for exercising her free speech rights and what evidence she could produce to establish her claims of disparate treatment on the basis of her sex. The court informed Hughes that it would consider these issues even though Appellees had not raised them in their summary judgment motion. When Hughes claimed that she had no notice that these issues would be raised at summary judgment, the court offered to grant her additional time to produce any evidence she had.[4]

Given the court's offer, Hughes' claim is misleading that she had no notice until the district court issued its order that the court might rely on issues not raised by Appellees. From the transcript of the hearing, Hughes did not explicitly accept or decline the offer from addressing those issues *sua sponte*. *See* JA at 420. As noted above, district courts clearly have the power to raise such issues *sua sponte*, and we hold that the district court properly put Hughes on notice under the standard in *Celotex*.

For similar reasons, we hold that the district court did not abuse its discretion under Rule 59(e) by refusing to amend its

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[3] Hughes also complains that the district court improperly dismissed her claims against Bowser in the face of her request for additional time to produce evidence regarding Bowser's liability. *See* JA at 460-61. The issueof Bowser's liability is not relevant to this appeal because we hold that the district court correctly dismissed all of Hughes' claims at summary judgment.

[4] The transcript reads: [Hughes' attorney]: I would submit that it doesn't preclude the Court from raising the issue su [sic] sponte. If we were given an opportunity to marshal evidence that the Court feels may not be in the record or protect the points we had, no notice would ever be raised. The Court: You are not telling me you were taken by surprise by the Court's inquiry and [sic] you need more time, then I'll give you more time. JA at 419-20.

judgment based upon evidence Hughes submitted to address the evidentiary concerns the court raised *sua sponte*. *See Temkin v. Frederick County Commissioners*, 945 F.2d 716, 724 (4th Cir.1991) (reviewing district court's denial of 59(e) motion for abuse of discretion), *cert. denied*, 502 U.S. 1095, 112 S.Ct. 1172, 117 L.Ed.2d 417 (1992). As reasoned above, the district court properly raised the factual concerns and allowed Hughes an opportunity for additional time to present supplemental evidence before the Court on the issues raised *sua sponte*. Hughes did not take the opportunity before summary judgment was entered and only proceeded to introduce previously-obtained evidence to meet her burden with respect to disparate treatment, a major deficiency noted by the district court in its January 4, 1994, Order. Hughes' supplemental affidavit supporting her 59(e) motion presented evidence that the same male sergeant who was not disciplined for one unlocked door incident was also not disciplined when a second incident occurred while he was the sergeant on duty.

In *RGI, Inc. v. Unified Industries, Inc.*, 963 F.2d 658, 662 (4th Cir.1992), this Court held that a district court did not abuse its discretion in refusing to consider a supplemental affidavit in support of a 59(e) motion after the district court reasoned that the litigant had offered "no justified reason" why the additional material was not presented earlier. *Accord Cray Communications, Inc. v. Novatel Computer Sys., Inc.*, 33 F.3d 390, 395-96 (4th Cir.1994) (holding that district court did not abuse discretion in denying 59(e) motion when litigant's only justification for not presenting supplemental evidence earlier was that its lawyer thought it was unnecessary"), *cert. denied*, — U.S.—115 S.Ct. 1254, —L.Ed. 2d —(1994). Similarly, given our conclusion that Hughes had notice of the issues the district court would consider in granting summary judgment and given Hughes' admission that she had the evidence before summary judgment, Hughes presents no justification for not sub-

mitting the supplemental affidavit before summary judgment. We therefore conclude that the district court did not abuse its discretion in refusing to consider the supplemental evidence in Hughes' Rule 59(e) motion.[5]

III.

Hughes next complains that the district court committed reversible error by granting Appellees summary judgment on her various discrimination and free speech claims. We review the district courts' granting of summary judgment *de novo*, *Wagner v. Wheeler,* 13 F.3d .86, 90 (4th Cir.1993), and consider facts and inferences drawn from the facts in the light most favorable to Hughes, the party opposing the motion, *Adickes v. S.H. Kress & Co.*, 398 U.S. 144, 157, 90 S.Ct. 1598, 1608; 26 L.Ed.2d 142 (1970); *Ross v. Communications' Satellite Corp.*, 759 F.2d 355, 364-65 (4th Cir.1985). We conclude that the district court properly dismissed Hughes' claims on summary judgment.

A. Sex discrimination claim

On appeal, Hughes first alleges that Appellees wrongfully discharged her on the basis of her sex in violation of the public policy enunciated in the North Carolina Equal Employment

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[5] The parties also debate whether the district court properly considered the testimony of Deputy Sheriff John Tyndall, who testified in a nameclearing evidentiary hearing for Hughes. Hughes argues that the court improperly considered the testimony. The court's opinion, however, indicates that the court construed the evidence in Hughes' favor and accepted Tyndall's assertions as true. It appears that the court discounted the testimony because it concluded that the testimony did not demonstrate the occurrence of any riot or disturbance at the jail and thus did not establish that Hughes' speech was of public concern. *See* JA at 479.

dismissed Hughes' claim based upon its determination that Hughes had not presented any evidence "from which a reasonable jury could find that the plaintiff was discharged because

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[6] This statute reads in pertinent part:

> It is the public policy of this State to protect and safeguard the right and opportunity of all persons to seek, obtain and hold employment without discrimination or abridgement on account of race, religion, color, national origin, age, sex or handicap by employers which regularly employ 15 or more employees.

N.C.Gen.Stat. § 143-422.2. This statute does not provide for a specific statutory remedy, and we therefore analyze Hughes' claims under the North Carolina common law of wrongful discharge. *See Iturbe v. Wandel & Goltermann, Technologies, Inc.*, 774 F.Supp. 959, 962-63 (M.D.N.C.1991), aff'd, 23 F.3d 401 (4th Cir. 1994); *cf Coman v. Thomas Mfg. Co.*, 325 N.C. 172, 381 S.E.2d 445, 447-48 (1989) (establishing a public policy exception to the employment at will doctrine under North Carolina law). The specific statutory remedy for state employees under N.C.Gen.Stat. § 162-36 does not apply to Hughes because she was an employee of CCSD.

We need not address Hughes' claims of sex discrimination under the Fourteenth Amendment, 42 U.S.C. § 1983, and the North Carolina Constitution. Hughes cannot bring a claim directly under the Fourteenth Amendment because it does not create a cause of action. Her claim under the Fourteenth Amendment merges into her § 1983 claim because § 1983 merely creates a statutory basis to receive a remedy for the deprivation of a constitutional right. *See Zombro v. Baltimore City Police Dept*, 868 F.2d 1364, 1366 (4th Cir.), *cert. denied*, 493 U.S. 850, 110 S.Ct. 147, 107 L.Ed.2d 106 (1989). Hughes cannot bring an action under § 1983 for violation of her Fourteenth Amendment rights because Hughes originally could have instituted a Title VII cause of action. *See Great American Federal Sav. & Loan Ass'n v. Novotny*, 442 U.S. 366, 37278, 99 S.Ct. 2345, 2349-52, 60 L.Ed.2d 957 (1979) (holding that a Title VII violation could not be asserted by way of 42 U.S.C. § 1985(3), the conspiracy counterpart to § 1983); *see also Zombro*, 868 F.2d at 1366-71 (reasoning that Age Discrimination in Employment Act forecloses actions for age discrimination under § 1983). Hughes initially filed a Title VII claim with the EEOC. The EEOC did not issue a determination letter on her charge, and instead issued Hughes a right to sue letter. Hughes, however, waived her right to

Continued on next page

she was a woman." JA at 482.

Given the similar language and underlying policy of § 143-422.2 and Tide VII 42 U.S.C. § 2000e *et seq.,* the North Carolina Supreme Court has explicitly adopted the Title VII evidentiary standards in evaluating a state claim under § 143-422.2 insofar as they do not conflict with North Carolina statutes and case law. *North* Carolina *Dept of Correction v. Gibson,* 308 N.C. 131, 301 S.E.2d 78, 82-85 (1983). Thus, in order to demonstrate a prima facie case of disparate treatment under §143-422.2, Hughes must show by a preponderance of the evidence that: (1) she is a member of a protected class; (2) she was qualified for her job and her job performance was satisfactory; (3) she was fired; and (4) other employees who are not members of the protected class were retained under apparently similar circumstances. *See Gibson*, 301 S.E.2d at 82-83; *see* also *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 802 & n.13, 93 S.Ct. 1817, 1824 & n. 13, 36 L.Ed.2d 668 (1973); *Cook v. CSX Transp. Corp.*, 988 F.2d 507, 511-12 (4th Cir.1993). Hughes must thus eliminate concerns that she was fired because of her performance or qualifications, two of the most common nondiscriminatory reasons for any adverse

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6 Continued from previous page

sue under Title VII because she did not file this lawsuit within the time permitted. Appellees' Br. at 61 n. 9.

Hughes' claim under the North Carolina Constitution similarly fails. A claimant whose state constitutional rights have been offended may pursue an action directly under the North Carolina Constitution only"'[i]n the absence of an adequate state remedy." *Corum v. University of N.C.,* 330 N.C. 761, 413 S.E.2d 276, 289 (1992), *cert. denied,* — U.S. — 113 S.Ct. 493, 121 L.Ed.2d 431 (1992). In this case Hughes has an adequate state remedy in her action for wrongful discharge in violation of the public policy in N.C.Gen.Stat. § 143-422.2. *See Alt v. Parker*, 112 N.C.App. 307, 435 S.E.2d 773, 779 (1993) (holding that claimant could not maintain direct action under Article I § 19, because he had adequate state remedies), *cert. denied,* 335 N.C. 766, 442 S.E.2d 507 (1994).

employment decision. *See Texas Dept of Community Affairs v. Burdine*, 450 U.S. 248, 253-54, 101 S.Ct. 1089, 1093-94, 67 L.Ed.2d 207 (1981).

If Hughes presents a prima facie case, Appellees can rebut her case by producing evidence of legitimate, nondiscriminatory reasons for the dismissal. If Appellees make this showing, Hughes must prove by a preponderance of the evidence that Appellees' proffered reasons are pretext *Id.* at 255, 101 S.Ct. at 1094; *Gibson*, 301 S.E.2d at 84. From these standards, "[t]he ultimate burden of persuading the trier of fact that the defendant intentionally discriminated against the plaintiff remains at all times with the plaintiff." *Burdine* 450 U.S. at 253, 101 S.Ct. at 1093, *quoted* in *Gibson*, 301 S.E.2d at 83. On top of these evidentiary standards for sex discrimination, at the summary judgment stage, Appellees must demonstrate that no genuine issue of material fact exists and, in turn, Hughes must present evidence from which a rational jury might conclude that Hughes was discharged because she is a woman. *See Matsushita Elec. Indus. Co., Ltd. v. Zenith Radio Corp.*, 475 U.S. 574, 585-87 & n. 10, 106 S.Ct. 1348, 1355-56 & n. 10, 89 L.Ed.2d 538 (1986).

To support her claim, Hughes presents evidence that Major Washburn told Hughes on the day she was discharged that the Sheriff's office had no other openings for her when, in fact, CCSD personnel records demonstrated that CCSD had a vacant Deputy II position in its Road Patrol Division. Hughes also presents evidence of other actions taken against jail employees responsible for unlocked door incidents, including evidence that a male staff sergeant was not reprimanded after employees discovered that jail doors were left unlocked during his shift in two separate instances.[7]

Because Appellees have produced evidence supporting the legitimate, nondiscriminatory reason that Hughes was discharged due to her security violations, Hughes must present evidence creating a genuine issue of material fact regarding whether Appellees' proffered reasons are pretext *See Gibson*, 301 S.E.2d at 84. Taking the evidence in the light most favorable to Hughes, we affirm the district court's conclusion that Hughes has not produced evidence sufficient to withstand summary judgment. Although Hughes' evidence is sufficient to establish a prima facie case, her evidence does not create a genuine issue of material fact regarding whether Appellees' proffered reasons are pretext.

Hughes' evidence that she was discharged even though a road patrol position remained open does not create a jury question on sex discrimination because she produced no evidence that a male responsible for similar security violations filled the position. Hughes also has failed to produce any evidence of prior remarks or actions on the part of Bedsole that would imply that he discriminated against her because of her sex. Fur-

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[7] Hughes produced the evidence of the second incident in her supplemental affidavit supporting her Rule 59(c) motion, and this Court is not obligated to consider affidavits and exhibits that were not before the district court when it made its decision. *Kaiser Aluminum & Chem. Corp. v. Westinghouse Elec. Corp.*, 981 F.2d 136, 140 (4th Cir.1992), *cert. denied*, — U.S. — , 113 S.Ct. 2339, 124 L.Ed.2d 250 (1993). This Court has nevertheless analyzed on appeal evidence offered in support of a 59(e) motion to determine whether affirming the district court's decision would result in a "miscarriage of justice." *See Id.* at 140, 146-47.

We will therefore consider Hughes' supplemental affidavit in reviewing the district court's summary judgment decision. In response to Hughes' 59(e) motion, Appellees also produced evidence to support their defenses. Given our summary judgment standard of considering the evidence in the light most favorable to the nonmoving party, however, we will not consider this additional evidence because Hughes timely objected to its introduction.

imply that he discriminated against her because of her sex. Furthermore, evidence before the district court at summary judgment demonstrates that male and female employees were treated more leniently than Hughes for security violations involving unlocked doors. Hughes' evidence of discipline of other jail employees shows that two female jailers were given one-day suspensions without pay when it was discovered that each of them left a jail door unlocked. More relevant to Hughes' discipline as a staff sergeant who supervises jailers, the EEOC notes introduced by Hughes recount that Bedsole stated that Marsha Hutchinson, another female staff sergeant, received only a 30-day probation for "leaving doors unlocked." JA at 235.

This evidence that a female staff sergeant was treated more leniently than Hughes largely undercuts her evidence that a male staff sergeant was not disciplined for two unlocked door incidents on July 19 and July 30, 1989. Although CCSD records and Bedsole's later statement to an EEOC investigator do not explain why the male sergeant was not disciplined for the July incidents, Appellees maintain that this apparent discrepancy in punishment was due to the fact that Hughes admitted her responsibility for the first security violation while the male sergeant did not so admit his responsibility.[8] In contrast to the male sergeant, Hughes testified that she told her supervising officer that she "would have to take the blame" for the unlocked door incident. Hughes Deposition II, November 10, 1992, at 58. She also testified that it "slipped [her] mind as far as getting up and going and checking" the doors because she was busy with paperwork and because she thought another jail employee was going to check the doors. *Id.* at 63-66.

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[8] See Oral Argument, *Hughes v. Bedsole*, No. 941299 (Oct. 31, 1994), in which Appellees stated that the evidence did not demonstrate one way or the other whether the male sergeant admitted any wrongdoing.

cumstances surrounding her security violations, as well as her overall performance at that time, were substantially similar to those of the male shift sergeant whom she cites as having received more favorable treatment. *Cf, Cook*, 988 F.2d at 511-12 (claimant failed to establish prima facie case of discrimination because evidence demonstrated that persons outside protected class were disciplined as severely and more severely than claimant). Additionally, the fact that a female staff sergeant was treated more leniently than Hughes further demonstrates that Hughes has failed to identify any jury issue as to whether Appellees' proffered nondiscriminatory reasons for Hughes' discharge were pretext. We therefore affirm the district court's decision that Hughes' evidence on sex discrimination is deficient and fails to establish sufficient evidence to withstand Appellees' motion for summary judgment.

B. *Free speech claim*

In the alternative, Hughes pursues on appeal her claims under the common law of wrongful discharge, 42 U.S.C. § 1983, and Article I, §§ 12 and 14 of the North Carolina Constitution[9] that she was unlawfully discharged for exercising her right to free speech under the United States and North Carolina Constitutions. It is clearly established that public employ-

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[9] The North Carolina Supreme Court has held that claimants may bring a direct cause of action under the North Carolina Constitution for alleged violations of "free speech rights." *Corum v. University of N.C.*, 330 N.C. 761, 413 S.E.2d 276, 289-91 (1992). In its reasoning, the *Corum* court cited Article I, § 14, of the North Carolina Constitution, which provides for the freedom of speech and press. The court did not cite Article I, § 12, which provides for the right of assembly and petition, and it is unclear whether *Corum* supports a direct cause of action under § 12. Because we hold that Hughes' free speech claims do not withstand summary judgment we need not decide whether she could properly bring a claim under Article I § 12.

ees have a First Amendment right not to have their employment conditioned upon refraining from constitutionally protected speech. *Rankin v. McPherson,* 483 U.S. 378,383,107 S.Ct. 2891, 2896, 97 L.Ed.2d 315 (1987); *Wagner* v. Wheeler, 13 F.3d 86, 90 (4th Cir. 1993). In *Mt. Healthy City School District Board of* Education v. Doyle, 429 U.S. 274, 97 S.Ct. 568, 50 L.Ed.2d 471 (1977), the Supreme Court outlined the inquiry courts must use to determine whether a public employee was unconstitutionally discharged for exercising free speech rights. Under this inquiry the employee has the initial burden of demonstrating that her free speech was a "substantial" or "motivating factor" in the adverse employment decision. *Id.* at 287, 97 S.Ct. at 576. The employee also bears an initial burden to demonstrate that her speech was constitutionally protected, ie., that her speech involved a matter of "public concern" and that her interest in commenting on the matter of public concern outweighed the public employer's interest in promoting the efficiency of the public services it provides. Id. at 283-87, 97 S.Ct. at 574-76; *Rankin,* 483 U.S. at 383-85, 107 S.Ct. at 2896-97. If the employee meets this initial burden, the burden shifts to the public employer to show by a preponderance of the evidence that the employee would still have been discharged in the absence of the protected speech. *Mt. Healthy,* 429 U.S. at 287, 97 S.Ct. at 576.

Hughes recounts the conversations at issue with Mitchell and Bedsole in her original complaint and in testimony during her first deposition. When asked about the conversation with Mitchell, Hughes responded during her deposition:

A. I spoke to him about things that were bothering me at that time, such as: not having enough people to work with, basically stress....

Q: Did you say anything else to Rev. Mitchell that you can recall?

A. About all the shifts being overworked. There was a lax in the security on a lot of the platoons. Other than that . . .

Q: Did Rev. Mitchell ask you any questions?

A. He listened and he told me, he said, "Sandy, you know there's nothing I can personally do about it, but with your permission, I think the Sheriff needs to be made aware of this. I would like to take this to the Sheriff, explain to him what is going on, but I need your permission to do that."

I told him, I said, "If you feel that it will help, by all means. Because we've got to have some help and some relief up here." That's where my conversation ended with him.

JA at 100-01. When asked during her deposition about what she told Bedsole, Hughes stated:

> I mentioned the being short handed, people that we had not being trained properly, the lax in security. He said he understood all of the problems. As far as the people right now, his hands were tied until they worked out the new budget.

JA at 108. She stated that she also told Bedsole that some of the male jail employees were making derogatory sexual slurs to female employees.

The district court predicated its decision on finding that the issues Hughes raised in her meetings with Mitchell and Bedsole were not of the type of public concern for which public employees are afforded constitutional protection. The district court thus did not base its holding on whether Hughes' speech was a substantial or motivating factor behind her discharge. Many courts reviewing such free speech claims, however, have addressed the public concern analysis after it is clear that the employee's free speech was a substantial factor behind the discharge. *See e.g., Rankin*, 483 U.S. at 382-84, 390, 107 S.Ct. at

2895-97, 2900; *Stroman v. Colleton County Sch. Dist*, 981 F.2d 152, 156 (4th Cir.1992). We do not reach the issue of 'whether Hughes' speech involved a matter of public concern because we hold that Hughes has not set forth specific facts raising a genuine issue of material fact regarding whether her speech was a substantial or motivating factor behind her discharge.[10] *See e.g., Wagner,* 13 F.3d at 91 (employee's claims do not withstand summary judgment under *Mt. Healthy* analysis because employee had not raised a genuine issue of material fact as to whether employee was discharged in retaliation for speech); *Goldsmith v. Mayor & City Council of Baltimore*, 987 F.2d 1064, 1071 (4th Cir.1993) (same); *O'Connor v. Chicago Transit Auth.*, 985 F.2d 1362, 1368-71 (7th Cir.1993) (same), *petition for cert. filed*, — U.S.L.W. — (U.S. July 12, 1993) (No. 935212); *Cusson-Cobb v. O'Lessker,* 953 F.2d 1079, 1081 (7th Cir.1992) (same); *cf O'Connor v. Steeves,* 994 F.2d 905, 913 (1st Cir.) (plenary review applies to *Mt. Healthy* motivation determination at summary judgment stage), *cert. denied*, — U.S. —, 114 S.Ct. 634, 126 L.Ed.2d 593 (1993).

Although the district court did not hinge its decision on Appellees' motivation, the court did make some "observations" suggesting that Hughes failed to demonstrate a jury issue on the question of whether Appellees' decision to discharge Hughes was motivated by an intent to retaliate for her free speech.[11]

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[10] Because we need not reach the issue, we express no opinion on whether Hughes' speech involved a matter of public concern.

[11] In its opinion, the district court held that it did not decide whether Hughes would not have been discharged "but for" her free speech, but the court did "observe" some facts regarding Appellees' motivation. JA at 480. This "but for" causation is actually the test Appellees would have to satisfy if Hughes first proved that her free speech was a substantial or motivating factor behind her discharge, *Mt. Healthy,* 429 U.S. at 287, 97 S.Ct. at 576; and we need not reach the "but for" test because Hughes has not satisfied this initial burden of proof.

The court first noted that Hughes was discharged following her admitted security violation and another security violation occurring within a few days of the first incident. The court further observed that Bedsole had agreed with Hughes that additional personnel were needed and that no evidence demonstrated that Bedsole harbored any animus due to Hughes' speaking to Mitchell outside the chain of command. JA at 480.

In the midst of these observations by the district court, Hughes contends that her claim should survive summary judgment because she was discharged within a few weeks after she first pursued her matters with Mitchell and Bedsole. Hughes cites several cases to support her contention that this temporal proximity demonstrates sufficient retaliatory motivation. None of the cases on which Hughes relies, however, involve the *Mt. Healthy* standard of proof, which is applicable in this case. For instance, Hughes cites as supporting authority this Court's decision in *Williams v. Cerberonics, Inc.*, 871 F.2d 452 (4th Cir.1989). In *Williams,* this Court held that a temporal connection between the employee's protected activity and her discharge was sufficient to establish causation necessary for a prima facie claim of retaliatory discharge under Title VII. To establish her prima facie case, however, the claimant in *William* was required to demonstrate only a "causal connection" between the protected activity and the adverse action. I& at 457. In contrast, the *Mt. Healthy* standard requires Hughes to demonstrate that her speech was a substantial or motivating factor.

Given the different standard in this case, the holding in *Williams* is nevertheless instructive in how this Court addressed the merits of the claimant's Title VII charge. After the court in *Williams* held that the claimant had demonstrated a prima facie case, the court held that the claimant did not ultimately prevail in her retaliatory discharge claim. The court reasoned, "mere knowledge on the part of an employer that an employee it is about to fire has filed a discrimination charge is not suf-

ficient evidence of retaliation to counter substantial evidence of legitimate reasons for discharging that employee." *William* 871 F.2d at 457; *see also Wagner*, 13 F.3d at 91 ("[T]emporal proximity ... is simply too slender a reed on which to rest a Section 1983 retaliatory discharge claim.").

The undisputed evidence in this case demonstrates that Hughes accepted the responsibility for leaving a jail door unlocked in one incident and that another unlocked door incident occurred while she was on duty a few days later. Hughes was suspended without pay after the first incident and was discharged after the second. Appellees declare that Hughes was discharged based on these two security violations, and Hughes offers no evidence of any comments Bedsole or Bowser made that imply that Hughes was discharged for expressing her concerns to Mitchell and Bedsole.[12] The parties agree that Bedsole maintained an "open door policy," and as the district court observed, the record demonstrates no animus between Bedsole and Hughes because Hughes met with Mitchell outside the chain of command.[13] Furthermore, during their conversation, Bedsole agreed with Hughes' concerns about the need for security personnel. Given the lack of any direct evidence of retaliatory intent, Hughes relies on the temporal connection between her free speech and her discharge and on the evidence noted above

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[12] Hughes points to no conduct Bedsole exhibited towards her, other than the discharge itself, to show that Bedsole harbored any resentment to Hughes because she expressed her concerns about understaffing and improper training. This lack of evidence is one factor that distinguishes this case from *Waters v. Churchill*, —U.S. —114 S.Ct. 1878, 1891, 128 L.Ed.2d 686 (1994), in which the Supreme Court concluded that the claimant had presented evidence of a genuine issue of material fact as to her employer's motivation behind her discharge.

[13] In fact, Leroy Park states in his deposition that Marsha Hutchinson, another female staff sergeant, met directly with Bedsole outside the chain of command. He added that he was not aware of any retaliatory action taken against Hutchinson as a result of this meeting.

in discussing her sex discrimination claim, in which a male sergeant, who did not so exercise his free speech rights, was not punished when he was the shift sergeant on duty during two incidents of unlocked jail doors.

We conclude that this evidence does not create a genuine issue of material fact as to whether Hughes' expressing her concerns about understaffing and improper training was a substantial or motivating factor behind her discharge. Considering Appellees' legitimate, nondiscriminatory reasons and the absence of any evidence of animus by Bedsole on account of Hughes' free speech, we hold the basic facts of the temporal connection and the male sergeant's receipt of no punishment after two similar security violation do not create a jury issue. We thus conclude that, as a matter of law, the evidence does not prove that Hughes' speech was a substantial or motivating factor in Appellees' decision to discharge her.

C. *Handicap discrimination claim*

Hughes also appeals her claim that she was unlawfully discharged because of the epicondylitis, or "tennis elbow,' she suffers on her right arm. She brings her claims under the Federal Rehabilitation Act of 1973, 29 U.S.C. § 701 *et seq.*,[14] and she primarily relies upon notes an EEOC investigator took during an interview with Bedsole after Hughes' discharge. In the

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[14] On appeal, Hughes also brings her handicap discrimination claim under the common law of wrongful discharge in violation of the public policy in N.C.Gen.Stat. § 143-422.2. *See* note 6, *supra.* She did not present these grounds in her complaint before the district court Because Hughes does not present sufficient reason to consider these new grounds, we need not address them on appeal. *See Muth v. United States,* 1 F.3d 246, 250 (4th Cir.1993) (court will consider issue raised for the first time on appeal "only in very limited circumstances, such as where refusal to consider the newly-raised issue would be plain error or would result in a fundamental miscarriage of justice").

notes, the investigator wrote that Bedsole said that Hughes "was not demoted because [he] couldn't put her back on the road (a lot of injuries) nor could she be put down into a jailer's position." JA at 232-33.

In order to establish a handicap discrimination claim, Hughes must first offer evidence that she is qualified as an "individual with a disability" under the Rehabilitation Act. *See* 29 U.S.C. § 794(a). The Act defines an "individual with a disability" as any person who "(i) has a physical or mental impairment which substantially limits one or more of such person's major life activities, (ii) has a record of such impairment, or (iii) is regarded as having such an impairment." 29 U.S.C. § 706(8)(B). The corresponding federal regulations further define "major life activities" as "functions, such as caring for one's self, performing manual tasks, walking, seeing, hearing, speaking, breathing, learning, and working." 29 C.F.R. § 1613.702(c).

Hughes has made no showing that her arm condition constitutes such a disability. To support her claim, Hughes cites cases in which courts have considered individuals with certain muscle and joint conditions to be handicapped for purposes of the Rehabilitation Act. The claimants in these cases suffered from more restricting conditions than Hughes' epicondylitis; and moreover, this Court has held that the question as to whether an individual meets the statutory definition of handicapped is best suited to a "case-by-case determination," *Forrisi v. Bowen*, 794 F-2d 931, 933 (4th Cir.1986) (*quoting E.E. Black; Ltd. v. Marshall* 497 F.Supp. 1088, 1100 (D.Haw.1980)). We have framed the proper inquiry as "whether the particular impairment constitutes for the particular person a significant barrier to employment." *Id.*

In this case, Hughes does not maintain that her epicondylitis substantially limits a major life activity as she alleges that she was fully capable of performing her tasks as Jail staff sergeant and road patrol officer without any significant restrictions. *See*

JA at 148-49. Furthermore, this Court has reasoned that the Rehabilitation Act's reference to substantial limitation indicates "that an employer regards an employee as handicapped in his or her ability to work by finding the employee's impairment to foreclose involved." generally the type of employment involved" *Forrisi*, 794 F.2d at 935. Hughes has failed to offer specific evidence to show that her arm condition bars her from seeking other employment in her field or that Bedsole considers her barred from law enforcement generally. *See Gupton v. Virginia*, 14 F.3d 203, 204-05 (4th Cir.) (rejecting claim under Rehabilitation Act because employee failed to show that an allergy to tobacco smoke foreclosed her opportunity to obtain jobs in her respective field), *cert. denied*, — U.S. — 115 S.CL 59, 130 L.Ed.2d 17 (1994). We therefore conclude that the medical diagnosis of Hughes' epicondylitis is insufficient to establish that her condition renders her legally handicapped under the Rehabilitation Act.

Moreover, § 794(a) of the Rehabilitation Act requires a claimant to demonstrate that the discharge was "solely by reason of her or his disability," 29 U.S.C. § 794(a); and Hughes has failed to establish a jury question on the issue of whether she was discharged solely because of her handicap. *See Little v. F.B.I.*, 1 F.3d 255, 259 (4th Cir.1993) (holding that claimant failed to show that he was terminated solely because of handicap). Hughes' only evidence to support handicap discrimination is the EEOC notes described above, and these notes do not rebut Appellees' assertions that Hughes was discharged for her security violations.[15] Thus, we affirm the district courses granting Appellee's summary judgment on Hughes' claims of handicap discrimination.

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[15] Furthermore, the EEOC investigator's parenthetical insertion of "a lot of injuries" suggests that Bedsole did not make the statement specifically in conjunction with his remarks on why Hughes was not demoted.

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

FILED
April 10, 1995

No. 94-1299
CA-91-115-3-H-D

SANDRA K. HUGHES

Plaintiff - Appellant

V.

MORRIS BEDSOLE, both individually and in his official capacity as Sheriff of Cumberland County, North Carolina; JAMES D. BOWSER, both individually and in his official capacity as a Major of the Cumberland County Sheriff's Department; CUMBERLAND COUNTY SHERIFF'S DEPARTMENT; CUMBERLAND COUNTY, NORTH CAROLINA; WESTERN SURETY COMPANY, INCORPORATED

Defendants - Appellees

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SOUTHERN STATES POLICE BENEVOLENT ASSOCIATION
Amicus Curiae

On Petition for Reheating
with Suggestion for Reheating In Banc

Appellant's petition for reheating and suggestion for rehearing in banc were submitted to this Court. As no member of this Court or the panel requested a poll on the suggestion for reheating in banc, and

AS the panel considered the petition for reheating and is of the opinion that it should be denied,

IT IS ORDERED that the petition for rehearing and suggestion for rehearing in banc are denied.

For the Court,

/s/ Bert M. Montague
CLERK

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NORTH CAROLINA
FAYETTEVILLE DIVISION

SANDRA K. HUGHES,
Plaintiff NO. 91-115-CIV-3-H-D
vs. MEMORANDUM OF DECISION

MORRIS BEDSOLE, both individually and in his official) capacity as Sheriff of Cumberland County, North Carolina, JAMES D. BOWSER, both individually and in his official) capacity as a Major of the Cumberland County Sheriff's Department, CUMBERLAND COUNTY, NORTH CAROLINA, and the WESTERN SURETY COMPANY, INC.,
Defendants

The plaintiff, who apparently has a penchant for prolixity, filed in this employment discrimination action a twenty-seven-page, 118-paragraph complaint alleging twelve separate causes of action the gist of which is that she was discharged from her position as a jailer by the defendant Sheriff of Cumberland County, North Carolina in violation of her free speech rights under the United States and North Carolina Constitutions, because she was a female and because she had a physical handicap. The case, which was randomly assigned to the Honorable Malcolm Howard of this court originally, was at his request transferred to the undersigned because of his overloaded docket. It is now before the court on the joint motion of all the defendants for summary judgment which motion has been fully briefed and argued orally by counsel. For the reasons to follow the motion will be granted.

At the outset the court must dispose of two preliminary matters. The first of these which was raised by plaintiff's counsel for the first time at the hearing on the summary judgment motion is his charge that absent a formal recusal by Judge Howard (and there has been none) the undersigned has no jurisdiction to hear the case. This objection is without merit and will be denied. What the Fifth Circuit had to say in a similar situation is appropriate here:

> Stone's contention that a district judge cannot transfer his arraignment calendar to another district judge without the consent of the accused and his lawyer is patently frivolous. District judges may by rule, order or consent transfer cases between themselves. Title 28, U.S.C.A. S 137 . . . . Each judge of a multi-district court has the same power and authority as each other judge..... Moreover, District Judges have the inherent power to transfer cases from one to another for the expeditious administration of justice.

United States v. Stone, 411 F.2d 597, 598 (5th Cir. 1969).

The second matter awaiting disposition prior to a ruling on the summary judgment motion is plaintiff's motion to strike the summary judgment motion and its supporting memorandum which the plaintiff has supported by a lengthy memorandum of law based on the alleged failure of defendants to comply with the local rules of this court with respect to the withdrawal and substitution of counsel, the furnishing of copies of unreported cases relied upon to opposing counsel and the filing of a brief in excess of thirty pages in length without the court's prior approval. Technically there was a failure on the part of defense counsel to comply with some of the requisites of the local rules, and the joint brief of the four defendants addressing the twelve causes of action set forth in plaintiff Is complaint did exceed

the authorized page limit by five pages, but upon being served with plaintiff's motion, defense counsel promptly furnished plaintiff's counsel and the court with copies of the unreported cases referred to in defendants' brief, and it is not perceived how the other technical violations complained of resulted in any prejudice to the plaintiff. In passing, the court observes that if the nineteen singled-spaced footnotes appended to plaintiff's own thirty-page brief had been doubled spaced, it, too, would have exceeded the thirty-page-limit, and if its 116 pages of attached exhibits are counted, plaintiff's brief would exceed 150 pages in length.

Plaintiff's motion to strike the summary judgment motion and its supporting memorandum of law will be denied.

Turning now to the motion for summary judgment, the facts involved here are not in serious dispute and may be briefly summarized as follows:

The plaintiff was first employed by the Cumberland County Sheriff's Department (CCSD) in 1976 as a matron in the jail. She filled this position for about eight and one-half years at which time she became a road patrol officer, a position she held for about three and one-half years during which time she sustained an injury to one of her arms which resulted in a chronic condition of epicondylitis commonly known as "tennis elbow." Upon reaching maximum medical improvement from this condition plaintiff returned to full-time duties in her road patrol position for about another year. In March of 1988 plaintiff was promoted to the rank of sergeant in the CCSD jail and assumed the duty of supervising one of the five platoons in the jail.

In February 1989 plaintiff, who had apparently become dissatisfied with some of the working conditions in the jail, conferred with the Reverend Norman Mitchell, the Jail Chaplain, to express her concerns and complaints to him regarding what she considered to be understaffing in the jail, and she also arranged for other employees to meet with Mitchell and express their concerns. Sometime prior to March 16 Mitchell contacted the Sheriff and relayed plaintiff's concerns where-

upon the Sheriff requested a meeting with the plaintiff and Mitchell to discuss matters.

During the shift under plaintiff's supervision two cellblock doors in the jail were found unlocked on March 16, 1989, and when this incident was reported to Sheriff Bedsole he suspended plaintiff for three days without pay. Upon her return to work on March 20, 1989 plaintiff and Chaplain Mitchell met with Sheriff Bedsole at which time plaintiff informed him of her concerns regarding understaffing, the improper training which in her opinion some of the CCSD employees had had and that there had been complaints from some of the female employees of the jail about derogatory remarks made to them by some of the male employees. In response Bedsole stated that because of the lack of funds additional staff could not be employed right away, but at the same time he asked plaintiff for her suggestions as to how the other problems with which she was concerned might be corrected. Plaintiff then suggested the names of three longtime jail employees in the jail who might serve as training officers, one of whom Bedsole rejected out of hand. As to plaintiff's other concerns the Sheriff assured her "that he would do an investigation into these matters, and things would get better."

Plaintiff had readily admitted her responsibility with respect to the unlocked door incident of March 16, 1989, and on March 24, 1989 while the plaintiff was the supervisor on duty another unlocked door was discovered at the jail. Following this incident the Chief Jailer, defendant James Bowser, recommended to the Sheriff that the plaintiff be fired, and on March 27, 1989 the Sheriff accepted Bowser's recommendation and discharged the plaintiff.

Between the two incidents of the unlocked doors plaintiff had gone to her immediate superior, Major Washburn, and asked that she be transferred to some other position even if it meant surrendering her sergeant's stripes. In a handwritten statement which appears in the record as Defendants, Exhibit 33 plaintiff stated:

> [Washburn] told me to just hang on a few more weeks because he was looking into the problems in the jail, and I had been put up in the jail for a reason, so hang in there a little while longer and things would get better.
>
> I also told Lt. Morin I had asked Maj. Washburn for a transfer.
>
> I also gave Lt. Morin a two weeks verbal notice that I was going to quit, because of the stress they were keeping us under, but Lt. Morin refused to accept my notice and told me to just go on and work and forget about it.

Following her discharge the plaintiff filed a complaint with the Equal Employment Opportunity Commissioner and an investigation was conducted by that agency resulting in her being furnished a right to sue letter. The EEOC's file has since been destroyed, but plaintiff has filed in this action the affidavit of the EEOC investigator in which she attests the accuracy of a copy of her handwritten notes of her investigation which have been attached to the affidavit. The following are pertinent excerpts from the notes of the investigator's interview with Sheriff Bedsole:

> When I became Sheriff I looked at the problems in the dept. [Sandra Hughes] was on road patrol. There were problems in the jail. We thought Sandy [would] do a good job as a leader in the jail. I chose to put Sandy in the jail as Ass't Shift Leader. She had problems. The Capt worked [with] her. We tried to get people to help her. There were problems on her shift. . . .
>
> I am trying to recruit/promote [female and] minorities. There are 290 employees in the [Sheriff's] Dept. [Female] Sgts in Supply, Detectives, Jails &

an acting supervisor in Juvenile. We look for minority [females] to put through school.

Sandy was not demoted [because couldn't] put her back on the road (a lot of injuries) nor [could] she be put down into a jailer's position . . . .

On 3/16 Sandy was disciplined for the doors being unlocked [because] 1. she was in charge 2.; she probably neglected to lock them 3. she [should] have discovered the doors unlocked. Because we are short handed we [could] not afford to actually have them take the days off.

3/16 Sandy [received] reprimand. Hearing held. Discipline upheld.

3/24 Cellblocks left open again.

Sandy caused problems [with] some of her employees . . . .

I don't normally get involved unless supervisors aren't doing their jobs.

Sgt- Parks did not [receive] a reprimand in 2/89 [because] it [could] not be determined who left the doors unlocked [on his shift] ....

When Sandy & Rev. Mitchell came, to see me a lot of her complaints had to do [with] being understaff & staff was not trained. Now we have a training [program] established. I was in agreement [with] her. I told her all 4 shift leaders had the same problem. I think her lack of "coping" had a lot to do with the situation. We have asked for personnel (from [county] commissioners but they've not allowed us to hire more people.

> Re Sandy's [allegations] concerning this discussion: I put out an order that profanity [could] not be used to any employees. I do not remember her making any allegations re discrimination. I agreed [with] her that there were problems, but I do not remember her stating that discrimination had occurred. There was no mention of any actions I took which she considered to be discriminatory. We have no set policies regarding disciplining employees for security violations.
>
> No knowledge of allegations made (during our discussion) re different [treatment], unfair [treatment], etc. as perceived by Sandy.

Following the unlocked doors incidents plaintiff requested and was given a grievance hearing before a board whose members she had chosen. The board concurred in Bowser's recommendation that plaintiff be discharged.

On these facts the plaintiff has managed to allege twelve causes of action against the defendants. She alleges:

1. That her rights of free speech and freedom of association under the United States Constitution were violated by defendants;
2. That her substantive due process rights under the Constitution were violated;
3. That her procedural due process rights under the Constitution were violated;
4. That her rights to free speech and freedom of association under the North Carolina Constitution were violated;
5. That her substantive due process rights under the North Carolina Constitution were violated;
6. That her procedural due process rights under the North Carolina Constitution were violated;
7. That she was discharged in violation of public policy;
8. That she was discharged as a result of discrimination under the federal handicap statutes;

9. That her rights to equal protection under the United States Constitution were violated;

10. That she was discharged as a result of unlawful discrimination under the North Carolina Constitution based on her sex;

11. That she is entitled to recover under the Sheriff's surety bond issued by the defendant, Western Surety Company, Inc.; and

12. That she is entitled to recover punitive damages.

In her brief on the summary judgment motion and during the course of oral argument on it counsel for plaintiff has conceded that defendants are entitled to summary judgment on portions of the twelve listed causes of action, and it will not be necessary for the court to deal with the matters thus conceded in this memorandum. Plaintiff's concessions are as follows:

1. Summary judgment should be granted in favor of defendants Bedsole and Bowser in their respective individual capacities as to the plaintiff's claims under the North Carolina Constitution.

2. Defendants Cumberland County, Cumberland County Sheriff Is Department, Bedsole and Bowser in their respective official capacities are all entitled to summary judgment with respect to the plaintiff's claim for punitive damages.

3. Plaintiff has not established that she was deprived of any liberty interest as a result of reference information CCSD provided to the Hope Mills Police Department.

4. Defendants are entitled to summary judgment on plaintiff Is claim of the violation of her right to associate under the United States and North Carolina State Constitutions.

5. Defendants are entitled to summary judgment with respect to the plaintiff Is claims of violation of her substantive due process rights.

The court will now consider the motion for summary judgment as it relates to the defendants separately.

CUMBERLAND COUNTY SHERIFF'S DEPARTMENT

The plaintiff has produced no law and presented no argument to show that. the CCSD is a legal entity with the capacity to sue and be sued. In any event, there is no evidence in the record to show that any action was taken with respect to the plaintiff by the Sheriff's Department as such. Instead, all of the action relating to plaintiff Is discharge was taken by the individual defendants, Bowser and Bedsole. The motion of CCSD for summary judgment will therefore be allowed.

CUMBERLAND COUNTY

Defendant Bedsole is an elected official of Cumberland County. He is not hired by the Board of County Commissioners or the County Manager but retains his office by popular election, and he is forbidden by statute to delegate to another person the final responsibility for discharging his official duties. N.C.G.S. § 162-24. One of his official duties is set forth in N.C.G.S. § 153A-103(1) as follows: "Each sheriff... elected by the people has the exclusive right to hire, discharge, and supervise the employees in his office."

In the face of this statutory law plaintiff strenuously insists that the employees of the CCSD are employees of Cumberland County which is therefore responsible for plaintiff's alleged wrongful discharge. Citing *Dotson v. Chester,* 937 F.2d 920 (4th Cir. 1991), plaintiff argues that because Sheriff Bedsole has "final policymaking authority" for Cumberland County with respect to personnel actions such as the one involved here and the county pays the salaries of the Sheriff's Department employees, federal law imposes liability on the county in this action. *See City of St. Louis v. Praprotnik*, 485 U.S. 112 (1988).

In the court's view plaintiff's reliance on *Dotson* is misplaced. That case decided under Maryland law involved an action to recover fees awarded the plaintiffs under a consent judgment entered in an action involving the maintenance of the

county jail. It was the county's responsibility to provide a jail, and the Sheriff was held to be the county's final policymaking authority with respect to the maintenance of the jail. No Maryland statute giving the sheriff the exclusive right to hire and discharge his employees was involved in that case.

Cited for the first time on oral argument by counsel for the plaintiff was a 74-page memorandum and recommendation made by Magistrate Judge Dixon of this court involving Cumberland County which was thereafter approved and adopted by Judge Howard. That case, which is entitled *Brewington v. Bedsole and County of Cumberland*, No. 91-120-Civ-3-H, entered May 14, 1993 in the Fayetteville Division of this court, is seemingly at variance with the conclusion reached here. At pages 33-34 of his memorandum of decision Magistrate Judge Dixon says:

> The County has no authority whatsoever in the Sheriff's personnel decisions pursuant to applicable state law. However, the Sheriff is the final policy-making official for the County on personnel decisions within the CCSD. His actions as an elected official bind the County, at least in this context, as the County has been given notice and an opportunity to respond.

The difficulty this court has with that conclusion is that notwithstanding it correctly states the law that the county has no authority in the Sheriff Is personnel decisions, it assumes that the county does in fact have authority in personnel decisions within the CCSD and that the Sheriff is the county's "final policy-making official" with respect thereto. In this court's view this simply begs the question. Under the state statute quoted above the county is in no way concerned in the hiring and firing of the Sheriff's employees, and the county therefore has no need whatever for a "final policy-making official" in CCSD personnel decisions.

In his memorandum of decision Magistrate Judge Dixon said that the question involved in the *Brewington* case was "a close one, " and it is predicted here that when that case comes to trial, Judge Howard will take a closer look at the question of whether Sheriff Bedsole is "the final policy-making official for the County on personnel decisions within the CCSD.`

The fact that Cumberland County pays the salaries of the Sheriff's Department employees is of no moment. The salaries have to be paid from some source, and the county, not the Sheriff, provides this source pursuant to its taxing authority, but this does not make the Sheriff's employees county employees. An analogous situation arises under the Eleventh Amendment cases in which the state is accorded immunity for the actions of certain employees notwithstanding the county pays the salaries of such employees. *See also Allen v. Fidelity & Deposit Company,* 515 F.Supp. 1185 (D.S.C. 1981), *aff'd,* 694 F.2d 716 (4th Cir. 1982).

The motion of Cumberland County for summary judgment will be allowed.

DEFENDANT BOWSER

The complaint alleges that during the times in question the defendant Bowser was employed in an executive capacity by CCSD and that he had immediate supervisory authority over the plaintiff; that he had "authority to make policy with respect to the discipline and/or discharge of any employee of the CCSD;" that he is sued in his official and individual capacities; and that all of his actions complained of were taken under color of his authority as a captain or major in the CCSD "pursuant to the custom, practice, and/or policy of the CCSD." The complaint goes on to allege that following the two incidents in which jail doors were found unlocked on plaintiff's shift Bowser recommended to Sheriff Bedsole that she be discharged and that this recommendation was made in retaliation for plaintiff's having conferred with the jail chaplain concerning problems she per-

ceived to be existing in the operation of the jail.

Sheriff Bedsole accepted Bowser's recommendation and discharged the plaintiff, but he did not have to do so, and it is difficult to see how this simple recommendation made by Bowser to the Sheriff, regardless of its motivation, could impose liability on him when the Sheriff was the only person vested with the statutory authority to hire and fire employees. Bowser's motion for summary judgment will be allowed.

DEFENDANT BEDSOLE

This brings us to a consideration of plaintiff's case against Morris Bedsole, Sheriff of Cumberland County, as the person solely responsible under the statute for all the personnel decisions made in the CCSD. The plaintiff alleges and has offered evidence which she contends shows that Bedsole fired her in violation of her free speech rights under the United States and North Carolina Constitutions; in violation of her rights on account of her sex; for violation of her rights under the due process clauses of the United States and North Carolina Constitutions; and in violation of her rights under the handicap statutes. These claims will be addressed seriatim.

The Free Speech and Equal Protection Claims

This claim is predicated upon plaintiff's claim that Bedsole fired her in retaliation for her having exercised her free speech rights in communicating her concerns about the operation of the jail to Chaplain Mitchell, and she correctly asserts that as a general principle public employees have the right not to have their employment conditioned upon refraining from speech protected under the First Amendment. *Connick v. Myers*, 461 U.S. 138, 142 (1983). The complaint alleges that in her meeting with the Chaplain she expressed "some concerns and/or complaints that she had with respect to the understaffing at the Cumberland County Jail" and that when she met with Bedsole

she complained "about the shortage of jailers and/or staff that were necessary to properly maintain the Cumberland County Jail during her shift." She also told Bedsole "of her concerns that some CCSD employees that were associated with her shift were not properly trained, " and she also told him that some of the male employees of the jail were referring to female employees with derogatory sexual slurs. (Paragraphs 20, 21 and 22 of the Complaint.)

To be protected by the First Amendment of the United States Constitution, and the provisions of the North Carolina Constitution are no broader, an employee's speech must involve a matter of "public concern." *Connick* at 146. The court has concluded that the plaintiff's statements quoted above do not measure up to this requirement.

While the fact that the statements were not made in a public forum is not controlling, the test is whether the matter is one in which "free and open debate is vital to informed decision-making by the electorate." *Connick* at 145. The definite impression here is that the plaintiff was simply grousing about the conditions of her own employment, a matter in which at best the public would have had only limited interest. Personal grievances concerning working conditions do not qualify as matters of public concern. *Lewis v. Blackburn*, 759 F.2d 1171 (4th Cir. 1985).

The plaintiff has argued on the basis of a self-serving declaration of her own and the inadmissible hearsay statement of a friendly fellow employee that she had security of the jail in mind when she made her statements about understaffing, and, of course, jail security would be a matter of undoubted public importance, but there is no evidence that the statements followed a disturbance or riot demonstrating the need for additional personnel. Matters of public concern normally involve charges of illegal action, abuse of authority or power, corruption or waste, and plaintiff's speech in this case involved none of these things. *Jurgensen v. Fairfax County, Virginia*, 745 F.2d 868, 871 (4th Cir. 1984).

Having failed to find that plaintiff's speech in this case involved a matter of public concern, the court does not reach the second step of the three-part inquiry outlined in *Mt. Healthy City School District Board of Education v.-Doyle*, 429 U.S. 274 (1977), and therefore does not decide whether the evidence would support a finding that plaintiff would not have been discharged "but for" her speech. It is observed, however, that plaintiff was discharged following her admitted violation of one serious security rule and that another similar incident occurred on plaintiff's shift for which she was responsible only a few days after the first incident. At the same time it will be recalled that the Sheriff agreed with the plaintiff that additional personnel was needed in the jail while stating that he could not employ additional help because of lack of funding. There is no evidence of any animus on the part of the Sheriff relating to plaintiff's speaking to the Jail Chaplain outside the chain of command or that he fired her on this account.

In support of her claim that she was denied equal protection under the United States and North Carolina State Constitutions plaintiff has cited an instance in which a male employee of the Sheriff's Department was given less severe disciplinary action for the same offense for which she was disciplined and later discharged, that is, allowing jail doors to be unlocked. The explanation of the Sheriff is that this apparent discrepancy in punishment resulted from the failure of the evidence to establish with certainty that the male employee was responsible for the doors being found unlocked on the male employee's shift. Plaintiff has failed to establish by the evidence that she was in fact the victim of disparate treatment, and her equal protection claim will therefore be denied.

Defendant has not raised the question as to whether the interest of the public, such as it was, in plaintiff's statements was nonetheless outweighed by the Sheriff's responsibility to manage the internal affairs of the CCSD and provide effective and efficient service to the public. This would involve the third step in the *Mt. Healthy* analysis which the court does not reach.

Defendant Bedsole's motion for summary judgment on the free speech and equal protection issues will be allowed.

The Sex Discrimination Claim

Plaintiff alleges and contends that she has offered evidence creating a genuine issue of fact as to whether she was discharged on account of being a female. She seeks to establish this claim under an exception to the employment at will doctrine which obtains in North Carolina which holds that employees may not be discharged for reasons which are in contravention of the public policy of the state. The plaintiff claims that Sheriff Bedsole discharged her in violation of the public policy of North Carolina expressed in its Equal Employment Practices Act, N.C.G.S. § 143-442.2.

To begin with, the court rejects defendant's argument that since the plaintiff had an adequate remedy under Title VII of the federal equal employment statute, her cause of action based upon the North Carolina statute should be dismissed as was the case in *Frazier v. First Union National Bank*, 747 F.Supp. 1540 (W.D.N.C. 1990). Defendant argues that while the North Carolina statute arguably constitutes an expression of public policy, it does not support a private action by a plaintiff alleging wrongful discharge. Since the case *of Amos v. Oakdale Knitting Company*, 331 N.C. 348, 416 S.E.2d 166 (1992), in which it was held that "public policy is violated when an employee is fired in contravention of express policy declarations contained in the North Carolina General Statutes, 11 the courts in this district have held that the existence of the right to bring an action under Title VII in the state and federal courts does not mandate the dismissal of a wrongful discharge claim based on a violation of North Carolina public policy. *Percell v. International Business Machines, Inc.*, No. 90538-Civ-5-D, decided December 8, 1992.

Defendant's position on summary judgment is nonetheless sound in this action, for there is simply no evidence in the record

from which a reasonable jury could find that plaintiff was discharged because she was a woman, and defendant's motion for summary judgment on this ground will be allowed.

The Procedural Due Process Claim

Plaintiff has alleged and offered evidence which she contends establishes a genuine issue of material fact as to whether she had a property interest in her job sufficient to support her claim that in the course of her discharge she was denied procedural due process under the United States and North Carolina Constitutions. Such a showing has long been required under the cases of *Board of Regents of State Colleges v. Roth*, 408 U.S. 564 (1972), and *Bishop v. Wood*, 426 U.S. 341 (1976).

Under North Carolina law employees of a Sheriff's Department serve at the pleasure of the Sheriff. Subject to the exception to the employment at will doctrine noted above, they can be discharged for any reason or no reason at all.

Plaintiff's argument that the existence of this public policy exception to the employment at will doctrine somehow vested her with a property interest in her employment is simply without merit. What was said by the Third Circuit in the recent case of *Clark v. Modern Group Ltd.* No. 92-2048, decided November 18, 1993 and reported at 62 L.W. p. 2364, is relevant here. The case involved the alleged unlawful discharge of an at will employee under Pennsylvania law contrary to that state's public policy exception to the rule:

> When an employer that is engaging . . . in an illegal activity seeks to coerce its employees into participating in that activity or condoning it by silence, the public's interest in exposing unlawful activities overrides the doctrine of employment at will. The public policy exception to the doctrine of employment at will does not exist, however, to protect the employee. Rather it is the protection of

society from public harm, or the need to vindicate fundamental individual rights, that undergirds an at-will employee's common law action for wrongful discharge in Pennsylvania.

Defendant's motion for summary judgment based on plaintiff's claim of the violation of her rights to procedural due process will be allowed.

The Claim of Handicap Discrimination

Plaintiff's claim that she was discharged on account of her handicap is apparently based on what Sheriff Bedsole told the EEOC investigator was his reason for his failure to demote plaintiff and put her back on road patrol. To begin with it will be noted that this statement attributed to the Sheriff was made after plaintiff had been discharged, and just how this statement can give rise to an inference that plaintiff's discharge was somehow related to the almost trivial injury she claims as a handicap is not readily apparent to the court. There might be a different case if plaintiff were suing on allegations that she was denied employment in the road patrol because of her alleged handicap, but she has only claimed that she was discharged because of her alleged handicap.

Be these things as they may, in order to establish a claim based on handicap discrimination the plaintiff must first offer evidence that she in fact qualified as a handicapped person under the Federal Vocational Rehabilitation Act of 1973, 28 U.S.C. § 706(8)(b); 29 C.F.R. § 1613.702(a). The Act requires that a claimant have a severe disability of a permanent nature which substantially limits "functions, such as caring for one's self, performing manual tasks, walking, seeing, hearing, speaking, breathing, learning, and working," 29 C.F.R. § 1613.702(c). Plaintiff has made no showing that she has any such disability. On the contrary, she has alleged that she is fully capable of performing the duties which were assigned to her in the jail and

when she was on road patrol.

Finally, under the Act it was incumbent upon the plaintiff to offer evidence as to whether her disability was the sole basis for her discharge. There is no evidence whatever in this record to support any such contention.

The defendants, motion for summary judgment based on plaintiff's claim of handicap discrimination will be allowed.

WESTERN SURETY COMPANY, INC.

Having found that the principal under the Sheriff's bond has not breached any of the obligations of the bond, it follows that the motion of Western Surety Company, Inc. for summary judgment must be allowed.

In view of the conclusions the court has reached on the summary judgment motions it is not necessary that the remaining issues relating to injunctive relief and punitive damages be addressed, and judgment sustaining the motions for summary judgment of all defendants will be entered.

/s/ F. T. Dupree, Jr.
F. T. DUPREE, JR.
UNITED STATES DISTRICT JUDGE

January 3, 1994.

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NORTH CAROLINA
FAYETTEVILLE DIVISION

SANDRA K. HUGHES,
Plaintiff

VS.

MORRIS BEDSOLE, both individually and in his official) capacity as Sheriff of Cumberland County, North Carolina, JAMES D. BOWSER, both individually and in his official) capacity as a Major of the Cumberland County Sheriff's Department, CUMBERLAND COUNTY, NORTH CAROLINA, and the WESTERN SURETY COMPANY, INC.,
Defendants

NO. 91-115-CIV-3-H-D

JUDGMENT

For the reasons stated in the court's memorandum of decision filed contemporaneously herewith it is now

ORDERED, ADJUDGED AND DECREED:

1. The objection of plaintiff to the hearing of defendants, motion for summary judgment by the undersigned is denied.

2. Plaintiff's motion to strike the summary judgment motion and its supporting memorandum is denied.

3. The motion for summary judgment of each defendant is sustained, and this action is hereby dismissed.

Let the plaintiff pay the costs.

/s/ F. T. Dupree, Jr.
F. T. DUPREE, JR.
UNITED STATES DISTRICT JUDGE

January 3, 1994.

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NORTH CAROLINA
FAYETTEVILLE DIVISION

SANDRA K. HUGHES,
Plaintiff

NO. 91-115-CIV-3-H-D

VS.

ORDER DENYING MOTION TO AMEND JUDGMENT

MORRIS BEDSOLE, both individually and in his official capacity as Sheriff of Cumberland County, North Carolina, JAMES D. BOWSER, both individually and in his official capacity as a Major of the Cumberland County Sheriff's Department, CUMBERLAND COUNTY, NORTH CAROLINA, and the WESTERN SURETY COMPANY, INC.,
Defendants

The motion for summary judgment of the defendants in this action was granted and by judgment entered January 4, 1994 the action was dismissed. Now before the court is plaintiff's motion to alter or amend the judgment with respect to the plaintiff's claims for sex discrimination and plaintiff's claims against Cumberland County. In support of their respective positions on this motion each side has filed additional evidentiary material, but since the court is of opinion that its review should be confined to the record as it existed at the time of the rendition of the judgment, none of this additional evidentiary material has been considered by the court in arriving at its decision on the motion. A thorough reconsideration of the original record, however, has failed to persuade the court that the judgment of January 4, 1994 was in error. Accordingly it is now

ORDERED that the motion of the plaintiff to alter or amend the judgment be and the same is hereby denied.

/s/ F. T. Dupree, Jr.
F. T. DUPREE, JR.
UNITED STATES DISTRICT JUDGE

January 28, 1994.

(2)

No. 95-215

In The

Supreme Court Of The United States

Supreme Court, U.S.
FILED
SEP 1 1995

OCTOBER TERM, 1995

SANDRA K. HUGHES,
Petitioner,

v.

MORRIS BEDSOLE, both individually and in his official capacity as Sheriff of Cumberland County, North Carolina; **JAMES D. BOWSER**, both individually and in his official capacity as Major of the Cumberland County Sheriff's Department; **CUMBERLAND COUNTY SHERIFF'S DEPARTMENT, CUMBERLAND COUNTY, NORTH CAROLINA**, and the **WESTERN SURETY COMPANY, INCORPORATED,**
Respondents.

RESPONDENTS' BRIEF IN OPPOSITION

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32 pp

Questions Presented by Petitioner

I. When presented with a prima facie case of sex discrimination and a prima facie case of First Amendment retaliatory discharge, may a public employer defendant meet its burden to articulate a legitimate, non-discriminatory reason(s) for its disparate disciplinary treatment and discharge of a plaintiff solely by the appellate argument of its counsel where the record does not contain any admissible evidence in which the employer sets forth the alleged non-discriminatory reason(s) for that disparate treatment?

II. Does a public employee and female plaintiff have a cause of action under the Fourteenth Amendment and 42 U.S.C. §1983 against a local governmental employer for employment discrimination on the basis of sex that is independent of any remedies or rights that may exist under Title VII of the Civil Rights Act of 1964?

III. Is there any material difference between the standard of proof and allocation of proof that a public employee must meet or articulate to demonstrate a prima facie case of retaliatory discharge in violation of 42 U.S.C. §2000e-3(a) of the Civil Rights Act of 1964, and the burden of proof and allocation of proof that a public employee must meet or articulate to demonstrate a prima facie case of retaliatory discharge in violation of the First Amendment?

IV. With respect to claims of sex discrimination and First Amendment retaliatory discharge, may a public employee and female plaintiff meet her burden to demonstrate a genuine issue of material fact as to her employer's retaliatory and discriminatory intent with respect to her discharge by production of evidence of disparate disciplinary treatment for which her employer did not articulate any legitimate, non-discriminatory reasons) that was submitted as admissible evidence in the record of the case?

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I. The Opinion of the Fourth Circuit Does Not Conflict with the Prior Decision of this Court In Texas Department of Community Affairs v. Burdine, 450 U.S. 248 (1981) or other Circuit Court Decisions; and Furthermore, Petitioner Is Precluded from Raising this Issue Because She Failed to Raise it in the Court Below. 15

II. Although the Fourth Circuit's Opinion Regarding Petitioner's §1983 Claim May Arguably be Contrary to its Prior Opinions, the Petitioner Nevertheless Received Full Consideration of Her Sex Discrimination Claim Under the Same Standards That Would Have Been Utilized to Consider Her §1983 Claim 18

III. The Opinion Below Does Not Conflict With the Opinion of this Court in Price Waterhouse v. Hopkins, 490 U.S. 228 (1989), Since the Fourth Circuit Correctly Applied Mt. Healthy City School Dist. Board of Education v. Doyle, 429 U.S. 274 (1977), and this Court Considers the Standard of Proof in Both Cases to be Essentially the Same. 20

IV. The Opinion Below Contains an Ample Explanation of the Evidence Upon Which the Fourth Circuit Found Petitioner's Evidence of Disparate Treatment Inadequate, and Thus the Fourth Circuit's Decision Does Not Conflict With Any Other Circuit Court Decisions. 22

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No. _____

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1995

SANDRA K. HUGHES,
Petitioner,

v.

MORRIS BEDSOLE,
both individually and in his official capacity as
Sheriff of Cumberland County, North Carolina;
JAMES D. BOWSER,
both individually and in his official capacity as
Major of the Cumberland County Sheriff's Department;
CUMBERLAND COUNTY SHERIFF'S DEPARTMENT,
CUMBERLAND COUNTY, NORTH CAROLINA,
and the
WESTERN SURETY COMPANY, INCORPORATED,
Respondents.

RESPONDENTS' BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

STATEMENT OF THE CASE

A. INTRODUCTION

Petitioner has misstated the actions taken by the U.S.

District Court and the United States Court of Appeals for the Fourth Circuit in this matter. The respondent's original motion for summary judgment did not include a request for summary judgment upon the petitioner's free speech claim and sex discrimination claim. However, Judge Dupree raised these issues sua sponte at the hearing. Judge Dupree placed the petitioner on notice that he was raising the issues sua sponte, and offered the petitioner additional time to come forward with any other evidence that she had. The petitioner neither accepted this offer of additional time nor elected to submit any evidence other than that evidence the parties had already placed before the Court. The petitioner merely expressed the opinion that Judge Dupree was precluded from dealing with these issues sua sponte.

The petitioner suggests that Judge Dupree's decision on her free speech retaliation claim and her sex discrimination claim was based solely upon certain legal arguments. To the

contrary, Judge Dupree considered the factual evidence before him, and determined that the evidence was inadequate. The Fourth Circuit held that the District Court acted appropriately by properly putting the petitioner on notice that it would consider the issues sua sponte, and offering the petitioner additional time to produce any evidence she had.

The petitioner has indicated that the Fourth Circuit affirmed the District Court's decision on grounds other than those upon which the District Court had relied with respect to these two claims. Her statement is misleading. With respect to the sex discrimination claim, Judge Dupree concluded that the petitioner had simply presented no evidence from which a reasonable jury could find in her favor. When the petitioner subsequently filed a motion with the District Court requesting that it alter or amend its judgment, both the petitioner and respondent submitted additional evidence. The District Court declined to consider any of the additional evidence that was

submitted. In her appeal to the Fourth Circuit, the petitioner elected to include this additional evidence for the Court's consideration. The Fourth Circuit considered this evidence, and relied upon it as an additional basis for upholding the District Court's action.

With respect to the free speech retaliation claim, the District Court concluded that the petitioner's speech did not involve a matter of public concern under the first step established by this Court in Connick v. Myers, 461 U.S. 138 (1983). The Fourth Circuit, on the other hand, reviewed the evidence and determined that it was not necessary to address the issue of whether the petitioner's speech involved a matter of public concern. Instead, the Fourth Circuit held that the petitioner's evidence did not raise a genuine issue of material fact indicating that her speech was a substantial or motivating factor behind her discharge.

The petitioner incorrectly portrays this case as one that

includes important public interest considerations. She suggests that her case raises extremely important issues affecting thousands of public employees across the country. A brief review of the decisions of the courts below indicates that she is mistaken.

The District Court in referring to the petitioner's free speech claims states: "The definite impression here is that the Plaintiff was simply grousing about the conditions of her employment, a matter in which at best the public would have had only limited interest." App. to Petition, p. 44A. With respect to the petitioner's claim that she has a disabling condition, the District Court stated:

> Plaintiff has made no showing that she has any such disability. On the contrary, she has alleged that she is fully capable of performing the duties which were assigned to her in the jail and when she was on the road patrol.

App. to Petition, p. 48A.

The Fourth Circuit noted in its opinion that there was

clear evidence that undercut the petitioner's evidence that she was the victim of sex discrimination; namely the evidence that another female staff sergeant was also treated more leniently than the petitioner. As for the petitioner's evidence that a male sergeant received less punishment for security violations, the Fourth Circuit stated:

> Hughes thus offers no evidence that the specific factual circumstances surrounding her security violations, as well as her overall performance at that time, were substantially similar to those of the male shift sergeant whom she cites as having received more favorable treatment.

App. to Petition, p. 20A.

Both the District Court and the Fourth Circuit were unable to find any merit whatsoever to the petitioner's claims since she failed to produce any evidence to support those claims. Her particular situation does not raise any issues of great importance to public employees.

B. FACTS

The petitioner has included misleading statements and

misstatements of fact in her petition. The petitioner indicates that her auto accident while working on the road patrol left her with a permanent injury to her arm that restricted the type of work that Hughes could perform. On the contrary, the condition which she describes did not restrict her from performing work. She was able to return to the road patrol without restrictions, and did so for an extended period of time until she was promoted to sergeant and reassigned to jail duty. She was also able to perform all of the requirements of the job as a shift supervisor in the jail. Her condition, more commonly known as "tennis elbow," would bother her from time to time, but never prevented her from performing her job.

Petitioner fails to mention that Sheriff Bedsole established the position of Chaplain for the Cumberland County Sheriff's Department ("CCSD") for the purpose of helping employees, in a confidential manner, with problems they might be having. There was no chain of command with respect to the

Chaplain. Any employee could talk with the Chaplain about problems or concerns without having to discuss those same problems or concerns with their immediate supervisor.

The petitioner briefly mentions Sheriff Bedsole's "open door" policy. Any employee, including the petitioner, was welcome to come see him about a problem. In fact, Sheriff Bedsole invited Chaplain Mitchell and the petitioner to come talk with him about the petitioner's concerns. Sheriff Bedsole indicated that he understood her concerns about not having enough people in the jail, but that his hands were tied until he could get the County Commission to approve the new budget which included additional positions. There is no evidence that Sheriff Bedsole was upset with what the petitioner had to say, or with the fact that she met with Chaplain Mitchell and with him to discuss the matter. There is no evidence that her speech had anything to do with her discharge. Although she was discharged shortly after her conference with Sheriff Bedsole

and Chaplain Mitchell, there was also another security violation by her shortly after this conference which brought about her dismissal.

There were several reasons why the petitioner was discharged. Among those reasons, she was responsible for serious security violations. She was also having a number of other performance problems. Officer Leroy Park indicated that she was always complaining to others about the jail and that her attitude had turned sour against the CCSD. In addition, the petitioner herself admitted having some problems with her supervisor Major Bowser, and on one occasion telling him that "he could take her job and shove it". The petitioner claims that her comment to Bowser, her mistreatment of her subordinates, her negative attitude toward Bowser and the jail, her derogatory comments about Bowser to others, and complaints from her subordinates about her had no bearing on her being fired. The District Court and the Fourth Circuit concluded

otherwise.

The petitioner places a great deal of emphasis upon an alleged statement that Sheriff Bedsole gave to the EEOC. This statement consists of notes that were made by the EEOC investigator during a lengthy meeting she had with Sheriff Bedsole. Sheriff Bedsole never reviewed or signed the notes prepared by the EEOC investigator. At the request of the petitioner, the investigator later signed an affidavit indicating that she had no specific recollection of her meeting with Sheriff Bedsole or what he said, but she knew her notes must be accurate. Sheriff Bedsole did prepare a separate signed statement explaining all of the reasons why he fired the petitioner rather than consider her for a transfer or demotion back to a road patrol position. Those reasons included the security violations, numerous problems getting along with staff in the jail, poor working relations with her supervisors, and actions she took which were disruptive to the operation of the

jail. Sheriff Bedsole's signed statement was submitted by the petitioner to the Fourth Circuit and considered by that Court.

The petitioner's own evidence demonstrates that both male and female employees were treated more leniently than she was for security violations. In one such incident, Officer Durden (female) was working under shift supervisor Sgt. Marsha Hutchison when Durden was responsible for a security violation. Durden received a one-day suspension, and Sgt. Hutchison received no disciplinary action. In another situation, Officer Susan Hollis received a one-day suspension for a security violation. The petitioner received a three-day suspension for the March 16, 1989 security violation. Each case was considered on its own merits. As the circumstances varied, the discipline varied.

C. THE DISTRICT COURT'S OPINION

The petitioner mischaracterizes how the District Court framed the sex discrimination and free speech retaliation issues.

The District Court found that petitioner's speech in this case did not involve a matter of public concern, and there was a lack of any evidence of any animus on the part of the Sheriff relating to her speaking with Chaplain Mitchell outside the alleged chain of command.

The District Court's finding that there was no evidence in the record from which a reasonable jury could find that the respondent was discharged because she was a woman, was based upon the petitioner's failure to produce any meaningful evidence. In commenting upon the petitioner's claim of denial of equal protection, the District Court mentions the extent of the evidence - "an instance in which a male employee of the Sheriff's Department was given less severe disciplinary action for the same offense for which she was disciplined and later discharged." App. to the Petition at p. 45A. This incident was one of the incidents involving a security violation on Sgt. Park's shift that is cited by the petitioner.

D. THE FOURTH CIRCUIT'S OPINION

The Fourth Circuit made a de novo determination of all of the evidence that was before the District Court, including the additional evidence submitted by the petitioner requesting that the District Court alter or amend its judgment. The Fourth Circuit applied the proper standard for review of a summary judgment order.

In a footnote, the Fourth Circuit mentioned that it did not address the petitioner's claims of sex discrimination under the 14th Amendment and 42 U.S.C. §1983 because her 14th Amendment claim merges into her §1983 claim and she cannot bring an action under §1983 because she had originally instituted a Title VII cause of action. Even if this portion of the Fourth Circuit's opinion is incorrect as the petitioner claims, it merely constitutes harmless error. The Fourth Circuit went on to fully evaluate all of the evidence Hughes presented regarding her sex discrimination claims, and decided that she

had established a prima facie case. However, upon review of all of the evidence including respondents' proffered reasons for the discipline and discharge of the petitioner, the Court concluded there was no genuine issue of material fact indicating that the reasons given by the respondents were a pretext for discrimination.

In arriving at its decision regarding the petitioner's free speech claims, the Fourth Circuit relied upon the undisputed evidence in addition to the arguments of counsel for the respondents. App. to the Petition, pp. 25A-27A. The Fourth Circuit concluded that since there was no direct evidence of retaliatory intent, Hughes could not rely solely on the temporal connection between her alleged free speech and her discharge, together with her evidence that a male sergeant (who did not exercise any free speech rights) was not punished as severely as she was for security violations.

EXPLANATION OF OPPOSITION TO PETITIONER'S REASONS FOR REQUESTING THE WRIT

I. THE OPINION OF THE FOURTH CIRCUIT DOES NOT CONFLICT WITH THE PRIOR DECISION OF THIS COURT IN TEXAS DEPARTMENT OF COMMUNITY AFFAIRS V. BURDINE, 450 U.S. 248 (1981) OR OTHER CIRCUIT COURT DECISIONS; AND FURTHERMORE, PETITIONER IS PRECLUDED FROM RAISING THIS ISSUE BECAUSE SHE FAILED TO RAISE IT IN THE COURT BELOW.

The petitioner simply failed to raise this issue in her appeal to the Fourth Circuit; that the respondents' rebuttal evidence to her prima facie proof of discrimination or retaliation was based on facts that were not in evidence. The petitioner failed to address this argument to the Fourth Circuit, and thus is precluded from raising it at this point. Except in

exceptional circumstances, where issues are neither raised before nor considered by the Court of Appeals, the Supreme Court will refuse to consider them. Lawn v. United States, 355 U.S. 339, 362-363, footnote 16 (1958); Adickes v. Kress and Co., 398 U.S. 144, 148, footnote 2 (1970).

Furthermore, the Fourth Circuit followed the law established by this Court in Burdine. The Fourth Circuit considered admissible evidence in the form of deposition testimony and written statements. Contrary to the assertions of the petitioner, the Fourth Circuit did not rely upon the contentions of respondents' counsel in appellate oral arguments and briefing. Among other things, this admissible evidence included the statement of Sheriff Bedsole, and the notes of the EEOC investigator that both include legitimate, non-discriminatory reasons for her termination. Other evidence includes the testimony of Sgt. Park about Hughes turning sour against the department and constantly complaining to others

about the jail. The Fourth Circuit mentions this evidence in its opinion (App. to Petition, p. 9A), and also notes the differences in the factual situations surrounding her security violations as compared to the alleged security violations committed by a male sergeant (App. to Petition, p. 20A). The Fourth Circuit considered this admissible evidence to be legally sufficient to justify a judgment for the respondents, once again following this Court's mandate in Burdine.

Both the District Court and the Fourth Circuit provided the petitioner the opportunity to submit evidence that these legitimate reasons proffered by the respondent were not true reasons but mere pretext for discrimination. In St. Mary's Honor Center v. Hicks, 113 S.Ct. 2842 (1993), this Court indicated that a reason cannot be proved to be "a pretext for discrimination" unless it is shown both that the reason was false and that discrimination was the real reason. The petitioner failed to present any evidence to establish that the reason was

false, much less establish that discrimination was the real reason she was discharged. Lacking any evidence of pretext, she has chosen to ignore the substantial evidence the respondents have presented and claim the Fourth Circuit reached its decision without reviewing any portion of the record other than the brief submitted by the respondents. In fact, before arriving at its decision, the Fourth Circuit secured the entire court record from the District Court so that it could review the depositions and the other evidence cited by the parties in their briefs that was not included in the Joint Appendix..

II. ALTHOUGH THE FOURTH CIRCUIT'S OPINION REGARDING PETITIONER'S §1983 CLAIM MAY ARGUABLY BE CONTRARY TO ITS PRIOR OPINIONS, THE PETITIONER NEVERTHELESS RECEIVED FULL CONSIDERATION OF HER SEX DISCRIMINATION CLAIM UNDER THE SAME

STANDARDS THAT WOULD HAVE BEEN UTILIZED TO CONSIDER HER §1983 CLAIM.

In a footnote to its decision, the Fourth Circuit indicated that the petitioner could not bring an action under §1983 for violation of her 14th Amendment rights because Hughes originally could have instituted a Title VII cause of action. Arguably, the opinions of some other federal circuits, and the Fourth Circuit's own opinion in Keller v. Prince George's County, 827 F.2d 952 (4th Cir. 1991), hold that the Plaintiff may under certain circumstances maintain a §1983 claim even though an accompanying Title VII claim has been dismissed. In Beardsley v. Webb, 30 F.3d 524 (4th Cir. 1994), the same court held that the Civil Rights Act of 1991 that allows recovery of damages and provides for trial by jury under Title VII does not mean that the plaintiff's claims under §1983 are thereby precluded. However, even if we assume that the Fourth Circuit's opinion is in error (and possibly a mere

oversight), no harm was done to the petitioner. Nevertheless, the Fourth Circuit went on to apply the appropriate standards of proof applicable to sex discrimination claims brought under §1983 or Title VII as enunciated by the Court in McDonald Douglas Corp. v. Green, 411 U.S. 792 (1973) and Burdine, supra. See App. to Petition, pp. 15A-21A. The Fourth Circuit went on to properly apply the standards developed in Title VII litigation which are the same standards that are applied under §1983. See Beardsley, supra; and St. Mary's Honor Center, supra, at 415, footnote 1.

III. THE OPINION BELOW DOES NOT CONFLICT WITH THE OPINION OF THIS COURT IN PRICE WATERHOUSE V. HOPKINS, 490 U.S. 228 (1989), SINCE THE FOURTH CIRCUIT CORRECTLY APPLIED MT. HEALTHY CITY SCHOOL DIST. BOARD OF EDUCATION V. DOYLE, 429 U.S. 274 (1977), AND THIS COURT CONSIDERS THE

STANDARD OF PROOF IN BOTH CASES TO BE ESSENTIALLY THE SAME.

The respondents hope that they are not the only ones that are uncertain as to what the petitioner is attempting to argue here. First, the petitioner should be precluded from making this argument because she did not raise this claim in the court below. The District Court based its decision upon the standards established in Mt. Healthy, which among other things included the "substantial" or "motivating factor" test, and the petitioner did not raise this issue before the Fourth Circuit.

If this Court should nevertheless consider this reason as a potential basis for appeal, it should note that the Fourth Circuit correctly applied the Mt. Healthy standards in finding that the petitioner had failed to prove that her speech was a substantial or motivating factor in Sheriff Bedsole's decision to discharge her. The petitioner's only evidence, the temporal connection and the lesser punishment of the male sergeant, was

simply not sufficient in light of the significant evidence presented by the respondents to the contrary. In Price Waterhouse, this Court concluded that the "substantial" or "motivating factor" standard is essentially the same as the "but-for" cause standard established by the court in that case. In correctly applying the law in Mt. Healthy, the Fourth Circuit in effect followed this Court's decision in Price Waterhouse. As the respondents have already indicated, the Fourth Circuit relied on admissible evidence rather than the oral argument of counsel, and such reliance is clearly reflected in the Court's written opinion.

IV. THE OPINION BELOW CONTAINS AN AMPLE EXPLANATION OF THE EVIDENCE UPON WHICH THE FOURTH CIRCUIT FOUND PETITIONER'S EVIDENCE OF DISPARATE TREATMENT INADEQUATE, AND THUS THE FOURTH CIRCUIT'S DECISION DOES NOT CONFLICT WITH ANY OTHER

CIRCUIT COURT DECISIONS.

The petitioner has apparently overlooked the evidence cited by the Fourth Circuit in its opinion. See App. to Petition, pp. 19A-20A. This evidence consists primarily of similar lenient treatment received by a female staff sergeant, and the differences between the security violations Hughes was involved in and other security violations that occurred on a male sergeant's shift. The petitioner acknowledged that she would take the blame for the door being unlocked, and that the unlocked door had "slipped [her] mind", thus indicating that she was aware that the door had been left unlocked. On the contrary, Sgt. Park in his deposition (which was before the District Court and the Fourth Circuit) indicated that he had no prior knowledge that any door was unlocked. Sgt. Park did not accept blame or fault for a door being discovered unlocked.

Based on this evidence, the Fourth Circuit concluded that the petitioner failed to produce evidence that the specific

factual circumstances surrounding her security violations, as well as her overall performance at the time, were substantially similar to those of Sgt. Park whom she claims received more favorable treatment. This represents a proper application of the evidence and law within the Fourth Circuit and other federal circuits.

CONCLUSION

This case does not include any important statutory or Constitutional issues. Rather, this case includes questionable claims that should not have been pursued beyond the discovery stage due to lack of evidence. There is no need for this Court to protect the rights of a local government employee to pursue a cause of action under 42 U.S.C. §1983 (in the absence of a Title VII claim), since virtually all of the federal circuits, including the Fourth Circuit, have concluded that such a right exists under appropriate circumstances. Once again, this Court should take note that the petitioner's claim of sex

Circuit pursuant to appropriate standards, albeit not under the purview of §1983.

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CERTIFICATE OF SERVICE

I certify that pursuant to counsel instructions, I mailed by certified mail, return receipt requested original and forty (40) copies of the foregoing Brief in Opposition to the Petition for Writ of Certiorari to the Clerk's Office of the Supreme Court of the United States, and mailed three (3) copies to counsel of record for the Petitioner, Robert J. Willis, Post Office Box 1269, Raleigh, NC 27602, on September 1, 1995.

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(3)

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No. 95-215

IN THE

Supreme Court of the United States

SARAH K. HUGHES,

Petitioner,

v.

MORRIS BEDSOLE, both individually and in his official capacity as Sheriff of Cumberland County, North Carolina; JAMES D. BOWSER, both individually and in his official capacity as Major of the Cumberland County Sheriff's Department; CUMBERLAND COUNTY SHERIFF'S DEPARTMENT, CUMBERLAND COUNTY, NORTH CAROLINA, and the WESTERN SURETY COMPANY, INCORPORATED,

Respondents.

PETITIONER'S REPLY BRIEF IN RESPONSE TO RESPONDENTS' BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

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No. 95-215

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1995

SARAH K. HUGHES,

Petitioner,

v.

MORRIS BEDSOLE, both individually and in his official capacity as Sheriff of Cumberland County, North Carolina; JAMES D. BOWSER, both individually and in his official capacity as Major of the Cumberland County Sheriff's Department; CUMBERLAND COUNTY SHERIFF'S DEPARTMENT, CUMBERLAND COUNTY, NORTH CAROLINA, and the WESTERN SURETY COMPANY, INCORPORATED,

Respondent.

PETITIONER'S REPLY BRIEF IN RESPONSE TO RESPONDENTS' BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

Pursuant to ¶6 of Rule 15 of the Supreme Court, petitioner Sandra K. Hughes files this reply brief to address certain new points raised in the Respondents' Brief In Opposition.

STATEMENT OF THE CASE

A. FACTS

The petitioner stands on the statement of facts set forth in her opening brief and petition for certiorari filed in this case at pages 8-11 of that brief. The petitioner adds that the "facts" recited at pages 9-11 of the Respondents' Brief In Opposition are simply not supported by any admissible evidence presented and received by the district court and the Fourth Circuit. Appendix to Petitioner's Petition for Writ of Certiorari (hereinafter cited as "App."), p. 15A (Fourth Circuit states: "Although CCSD records and Bedsole's later statement to an EEOC investigator do not explain why the male sergeant was not disciplined for the July incidents. . . "). Contrary to respondents' assertion at page 11 of the Respondents' Brief, the Fourth Circuit specifically declined to consider the unsworn statement of Sheriff Bedsole cited at page 10 of the respondents' brief in opposition and other evidence which the respondents submitted in opposition to the plaintiff's motion under Rule 59(e), Fed.R.Civ.P., based upon the petitioner's "timely objection to its introduction." App. at 14A, fn.7. Similarly, none of the various "problems" listed at page 9 of the respondents' Brief in opposition other than the "serious security violations" were ever presented in the form of admissible evidence as the "several reasons why the petitioner was discharged." Respondents' Brief in Opposition, p. 9, App., p. 15A. In fact, evidence in the form of a letter dated April 24, 1989 from the Sheriff's Legal Advisor to the EEOC and the testimony of respondent James Bowser at the petitioner's unemployment compensation hearing on May 30, 1989 was presented which tended to show that the only reason offered by the respondents at or close to the petitioner's discharge as the reason for her discharge was "because of doors within the jail being found unlocked on two occasions" on the shift supervised by the petitioner.

Lastly, the petitioner did not fail to address both the first and third reasons for granting the writ that are presented in Sections I and III of the Petition for Certiorari filed in this case. The respondents' argument at pages 15 and 21 of the Respondents' Brief notwithstanding, the petitioner raised the first reason for granting the writ at page 40 of the Appellant's Opening Brief filed with the Fourth Circuit, and at pages 1-2 and 10-11 of the Appellant's Reply Brief filed with the Fourth Circuit. As for the petitioner's third reason for granting the writ, the petitioner raised that third reason with the Fourth Circuit at pages 38-40 of the Appellant's Opening Brief filed with the Fourth Circuit, at pages 12-13 of the Appellant's Reply Brief filed with the Fourth Circuit, and in ¶2 at pages 4-5 of the Appellant's Petition for Rehearing and Suggestion for Rehearing In Banc filed with the Fourth Circuit.

REASONS FOR GRANTING THE WRIT

The petitioner adopts and incorporates by reference the argument and authority cited in at pages 14-22 of her Petition for Writ of Certiorari filed in this action. The Respondent's Brief In Opposition appears to rely on the same "evidence" that the Fourth Circuit expressly noted was not in the record in admissible form as support for the respondents' contention that all of the reasons advanced by the petitioner for the granting of the writ are inadequate. See Respondent's Brief In Opposition, pp. 16 ("testimony of Sgt. Park about Hughes turning sour against department", etc.), and 23-24. For example, the respondents urge that this Court should not disturb the Fourth Circuit's reliance on the petitioner's "knowledge" that a door was unlocked to distinguish petitioner from Sgt. Park when the record noted by the Fourth Circuit itself contains no evidence as to whether or not Sgt. Park did "accept blame or fault" for two unlocked door incidents in July, 1989,

and whether or not Sheriff Bedsole actually relied upon that distinction. Compare Respondents' Brief, p. 23, with App. p. 15A. The petitioner submits that this argument is in direct conflict with the holding of this Court in *Texas Department of Community Affairs v. Burdine*, 450 U.S. 248, 255 (1981), with respect to the Court's requirement that the defendant has the burden to articulate the "reasons for the plaintiff's rejection" "through the introduction of admissible evidence", and may not satisfy that burden through the argument of counsel or some other form of inadmissible evidence. *Id.*

CONCLUSION

For the reasons set forth in her Petition for Writ of Certiorari and as set forth above, this case presents the Court with an opportunity for resolving important statutory and constitutional issues relating to the type, order, and nature of the proof that is required to rebut a prima facie claim of employment discrimination claim under 42 U.S.C. §§2000e-2(a)(1), 2000e-3(a), 42 U.S.C. §1983, and the First and Fourteenth Amendments, and their relationship to the type, order, and nature of the proof required to demonstrate and rebut a prima facie claim of free speech, public employee employment retaliation. This case also presents the Court with an opportunity to determine whether a female employee of a local governmental employer has a cause of action under 42 U.S.C. §1983 and the Fourteenth Amendment for sex discrimination in that employment that is independent of any cause of action that she may have under Title VII of the Civil Rights Act of 1964.

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